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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 545

THE CLARKSDALE MUNICIPAL SEPARATE SCHOOL DISTRICT, ET AL.,
*Petitioners,*

vs.

REBECCA E. HENRY, ET AL.,
*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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*Petitioners,*

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REBECCA E. HENRY, ET AL.,
*Respondents.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, Clarksdale Municipal Separate School District, a school district organized under the laws of Mississippi, Gycelle Tynes, Superintendent of the schools of the school district, and the members of the Board of Trustees of the school district, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on March 6, 1969.

## OPINIONS BELOW

The opinions and orders of the District Court of the United States for the Northern District of Mississippi in the above case are not reported. Copies are included in the Appendix at pages A26 to A84. The opinions of Claude F. Clayton, District Judge, rendered August 10, 1965, and December 10, 1965, which are included in the Appendix at pages A31 to A67, and pages A76 to A82, and the orders of the District Court entered pursuant thereto on said dates, which are included in the Appendix at pages A68 to A75, and pages A83 to A84, are the opinions and orders from which respondents appealed to the United States Court of Appeals for the Fifth Circuit.

The opinion of the United States Court of Appeals, which was rendered March 6, 1969, more than 33 months after the case was argued before that court on May 25, 1966, is reported at 409 F. 2d 682. A copy is included in the Appendix at pages A1 to A22.

## JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was made and entered on March 6, 1969. A copy is included in the Appendix at pages A23 to A24.

The order of the United States Court of Appeals for the Fifth Circuit denying petitioners' Petition for Rehearing in Banc was made and entered on June 26, 1969. A copy is included in the Appendix at page A25.

The jurisdiction of this Court is invoked under U.S.C. 1254 (1).

## QUESTIONS PRESENTED FOR REVIEW

In *Brown I* and *Brown II* (347 U.S. 483, 98 L. Ed. 873; 349 U.S. 294, 99 L. Ed 1083), this Court called for the cessation of the practice of segregating children solely on the basis of their race, and the establishment of systems whereby the admissions of children to public schools would be determined on a nonracial basis. In spelling out how those objectives could be accomplished, it authorized *the revision of school districts and attendance areas, within the limits set by normal geographic school districting, into compact units, to bring about a system not based on color distinctions.* Consequently, when the Seventh, Tenth, Fourth and Sixth Circuit Courts of Appeals were required to pass on the constitutionality of desegregation plans which provided for the creation of attendance areas or zones fairly arrived at, bounded by natural, nonracial monuments which defined, in truth and in fact, true neighborhoods, and directed that all children living in an attendance area or zone, without exception, should attend the appropriate school in his or her attendance area or zone, each ruled in favor of the constitutionality of such plans, even though some of the attendance areas or zones were populated, as a result of housing patterns in the community, with people of one race. In addition, the Congress and the President of the United States, through the enactment of the *Civil Rights Act of 1964*, placed their approval on the holding of the Court of Appeals for the Seventh Circuit in *Bell* v. *School City of Gary, Ind.*, 324 F. 2d 209 (certiorari denied 377 U.S. 924, 12 L. Ed. 2d 216) wherein the fact of de facto segregation which fortuitously resulted from housing patterns was held not to invalidate a school system developed on the neighborhood school plan, honestly and conscientiously con-

structed with no intention or purpose to segregate the races.

Yet despite the fact that when this Court spoke in *Brown* of attendance areas, it said that such areas should be "compact units" constructed "within the limits set by normal geographic school districting," and when it spoke in *Brown* of the type of school system which should be created, it said that such system should be "a system not based on color distinctions," and when it spoke in *Brown* of admission policies which should be achieved, it said that admissions of children to public schools should be on "a nonracial basis," and despite the fact that the thrust of *Bell*—"which was that if school districts were drawn without regard to race, . . . those districts are valid even if there is racial imbalance caused by discriminatory practices in housing"—was written into the *Civil Rights Act of 1964*, and despite the provisions of *Sections 401, 407* and *410* of the *Civil Rights Act of 1964*, wherein school districts were authorized to assign students according to their residences and courts were prohibited from shifting students in order to achieve racial balance, the Court of Appeals for the Fifth Circuit, relying on "freedom-of-choice" cases, ruled in this case that petitioners' zone lines should be gerrymandered in order to alleviate racial imbalance resulting from housing patterns and that "if there are still all-Negro schools, or only a small fraction of Negroes enrolled in white schools, . . . then, as a matter of law, the existing plan fails to meet constitutional standards as established in *Green* and its companion cases."

The questions presented for review are:

1. Whether de facto segregation which occurs fortuitously because of housing patterns renders an otherwise acceptable desegregation plan unconstitutional.

2. Whether a school district can be required to gerrymander its attendance area or zone lines so as to include pupils of a certain race within an attendance area or zone, who would not be included therein if its attendance area or zone lines were drawn in a reasonable, rational and nonracial fashion.

3. Whether the courts, in view of the provisions of the *Civil Rights Act of 1964*, have authority to issue orders seeking to achieve a racial balance in neighborhood schools.

4. Whether the constitutionality of an attendance area or zone plan should be judged by the requirements of decisions dealing with "freedom-of-choice" plans.

## THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the pertinent parts of the Fourteenth Amendment to the Constitution of the United States—

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . . nor deny to any person within its jurisdiction the equal protection of the laws."

It also involves the pertinent parts of *Section 401* of the *Civil Rights Act of 1964* (42 U.S.C. §2000c.)—

> " 'Desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance."

And the pertinent part of *Section 407* of the *Civil Rights Act of 1964* (42 U.S.C. §2000c-6.)—

". . . nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, . . ."

And *Section 410* of the *Civil Rights Act of 1964* (42 U.S.C. §2000c-9.)—

"Nothing in this subchapter shall prohibit classification and assignment for reasons other than race, color, religion, or national origin."

## STATEMENT OF THE CASE

This is the first school desegregation case brought in the Northern District of Mississippi. It was begun April 22, 1964, by the filing of a complaint, accompanied by a motion for a preliminary injunction, wherein respondents, on behalf of themselves and other Negro children similarly situated, demanded, among other things—

a) the end of all racial designations and considerations in the budgets, expenditures, programs, policies and plans of the school district;

b) the establishment of school zones or attendance areas on a nonracial basis; and

c) the assignment of pupils to the schools of the school district on a nonracial basis.

Jurisdiction was invoked pursuant to the provisions of *28 U.S.C. §1343 (3), 42 U.S.C. §1983,* and the *Fourteenth Amendment to the Constitution of the United States.*

Petitioners did not question the right of respondents to such relief. To the contrary, in order to acquaint themselves with the requirements respecting such relief, they employed the writer as their attorney and sought his advice

about the requirements of *Brown* v. *Board of Education*, 347 U.S. 483, 98 L. Ed. 873; 349 U.S. 294, 99 L. Ed. 1083, and the cases which had followed in its wake (R. 203). They were advised by him that *Brown* required the cessation of the practice of segregating children solely on the basis of race and the achievement of a system of determining admissions to the schools of the district on a nonracial basis (R. 203), and that in the pursuit of those objectives the Constitution and the cases required them to discard all considerations of race and to treat the pupils of the district as individuals—neither as Negroes nor whites (R. 203, 205).

On the basis of such advice, petitioners thereupon undertook to provide respondents with the relief to which they were entitled under *Brown*, and to do so in the manner spelled out by this court in *Brown*. That meant, of course, the choice of desegregating the schools of the district by the establishment of attendance areas or zones, rather than through the dubious but more popular "freedom-of-choice" method (R. 205).

Then, having chosen to establish attendance areas or zones, petitioners proceeded to the fixing of the boundary lines. That, of course, required a consideration of the way the district is laid out and the location of its schools (R. 209, 210).

Clarksdale is a town of approximately 25,000 inhabitants. It is bisected by the railroad tracks of the Illinois Central Railroad Company which run in an easterly and westerly direction from the northeastern to the southwestern corner of the town, dividing it into approximately equal northerly and southerly halves (R. 213, 214). Accentuating the division of the residential areas of the town made by those railroad tracks is the fact that throughout a good portion of the town the lands adjacent to both the northerly and southerly side of those railroad tracks are

occupied by commercial and industrial establishments. Also adding to such division is the fact that those railroad tracks, located as they are in a town situated in the flat lands of the Yazoo-Mississippi Delta, are on an embankment. With but one exception (which is where Sunflower Avenue crosses over the tracks), no one can cross those railroad tracks from one residential area to another except through an underpass. And throughout the length of those railroad tracks as they pass through Clarksdale—some three and a half miles—there are but four underpasses, with but one west of the Sunflower River and that one right next to the river. (See maps.)

There is a high school north of those railroad tracks which is adequate—but not more than adequate—for those high school pupils who live north of those railroad tracks (R. 219, 223).

There is a more than adequate high school south of those railroad tracks which is modern in every particular —much more so than the high school north of the tracks —for those high school pupils who live south of those railroad tracks (R. 219, 221).

There is a junior high school north of those railroad tracks which is also adequate, although obsolete, for those junior high school pupils who live north of those railroad tracks (R. 225).

There was a modern and adequate junior high school south of those railroad tracks for those junior high school pupils who live south of those railroad tracks (R. 225). Now there are two.

In the light of those facts, petitioners reached the obvious conclusion that two high school sub-districts and two junior high school sub-districts should be established, with those railroad tracks as the dividing line between the sub-districts. (See maps.)

The southerly half of the town is bisected almost equally by the railroad tracks of the Illinois Central Railroad Company which run in a southerly direction from Clarksdale to Jackson and are referred to in the plans as running from Clarksdale to Mattson (R. 210). Those tracks, which create a southwest quadrant and a southeast quadrant, are not elevated and one can cross over at grade level at almost every intersection. About as many pupils live in the southwest quadrant as in the southeast quadrant.

There are two modern elementary schools in the southwest quadrant of the town which can adequately take care of the pupils in that neighborhood (R. 227).

There are three elementary schools in the southeast quadrant of the town—one quite modern—which can adequately provide for the pupils in that neighborhood (R. 227).

Since those are the facts with reference to the territory and schools south of the east-west railroad tracks of the Illinois Central Railroad Company, petitioners reached the obvious conclusion that two elementary sub-districts should be established south of those east-west railroad tracks, with the north-south railroad tracks of the Illinois Central Railroad Company as the dividing line between them, and with each of those sub-districts divided into attendance areas or zones. They then divided the southwest quadrant into two attendance areas or zones, with an elementary school in each of those attendance areas or zones, and they divided the southeast quadrant into three attendance areas or zones, with an elementary school in each of those attendance areas or zones. (See maps.)

The northerly half of the town is bisected by the Sunflower River, but there are many more pupils in the northerly half of the town west of the river than east of the

river, due principally to the fact that the central business district of the town is in the northerly half of the town east of the river (R. 216, 228, 230). There are two bridges over the river in that section of the town (just as there are two bridges over the river in the southerly half of the town) which enable those elementary school pupils who live in the northeast quadrant of the town and north of First Street to pass over into the northwest quadrant of the town (which is entirely residential) without passing through the central business district. (See maps.)

There are three elementary schools in the northwest quadrant of the town (R. 228). The northeast quadrant had none, but petitioners' plans committed them to try to have one built there in 1966 (R. 228).

With those facts before them, petitioners established two elementary sub-districts in the northerly half of the town with Sunflower River as the dividing line between them; divided the northwest quadrant of the town into three attendance areas or zones, with an elementary school located in each of them; and then provided that those elementary school pupils in the northeast quadrant of the town (where there was no elementary school) could —for the present—attend either Oakhurst Elementary School (the westernmost elementary school in the northwest quadrant) or Eliza Clark School (the northernmost elementary school in the southeast quadrant) (R. 229, 231).

Thus, by utilizing the obvious and indisputable natural barriers which separate Clarksdale into separate and distinct neighborhoods as the boundary lines for the various sub-districts, petitioners established sub-districts demanded by the topography of the town, the location and the capacity of the school buildings, the proximity of the pupils to the school buildings, and the requirements of good educational practices. They took the same action as

they would have taken had all of the pupils of the school district been white, or all Negro, or had every other residence in the town been occupied by whites and the remainder by Negroes. They discriminated against no one.

None of the interior lines dividing the elementary school districts into separate attendance areas or zones have ever been seriously questioned with the exception of the north-south line between what was originally the E-1-B (Hall) zone and the E-1-C (Clark) zone, which was originally selected so as to ensure sufficient room at the Eliza Clark School for those children who lived closest to it and those children in the E-3-A zone who had to go there because of a lack of an elementary school in their home zone (R. 246). Because of its dubious validity as a dividing line between the two zones, it failed to win approval of the district court. Thereafter, to meet that problem, petitioners proposed what is favorably known as the "Princeton Plan" among those active in mixing the races in the schools. Their proposal called for combining the two zones into one, to be designated E-1-B, with the two schools (Hall and Clark) to be administered by one set of administrative officials. Grades one and two would attend Eliza Clark and grades three, four, five and six would attend Myrtle Hall (R. 130).

After a hearing, petitioners' revised plans were approved by the trial court and ordered into effect for the 1966-67 school year (R. 148-149).

Racially, Clarksdale is almost evenly divided between Negroes and whites, and, of course, as in all other towns and cities where there is a bi-racial population, there is no even distribution of the races throughout the community. A majority of the whites live north of the east-west railroad tracks. Most of the Negroes live south of those tracks. But there are sizable areas where the races are

mixed. Sub-District S-1 and Sub-District J-1 both have a substantial amount of racial mixture in their population. In Zone E-2-B (Riverton), about half of the area is composed of white residences and a considerable proportion of the population is white. In Zone E-2-A (Booker T. Washington), there are a few people who are not Negroes. The original Zone E-1-C (Eliza Clark) was populated entirely by whites, but then it was combined with Zone E-1-B (Myrtle Hall) which is predominantly, but not entirely populated by Negroes. Zone E-1-A (George Oliver) has a considerable number of whites among its predominantly Negro population. By adopting a "neighborhood school" plan and requiring all pupils to attend the school in the zone wherein he or she lives—thus basing their admissions' policy on residence and not on race—and particularly *by providing that every white pupil in a racially mixed neighborhood is assigned by virtue of his residence to a formerly all-black school,* petitioners met all requirements of *Brown* and established, as much as it was within their power so to do, a desegregated school system which necessarily had to result in integrated schools if the school children of Clarksdale attend public schools.

To be specific, under petitioners' desegregation plan—

> The schools of the district were completely desegregated by the beginning of the 1967-1968 school year.
>
> The segregation of pupils on the basis of race has been ended.
>
> Compact attendance areas or zones, with reasonable, rational and natural boundaries have been established in order to achieve a system of determining admission to the schools of the district on a nonracial basis.

All racial designations have been abolished and all racial considerations have been abandoned.

All students desiring to take a course not offered at the school he or she attends but offered at another school are allowed to transfer to the latter school.

No transfers other than those referred to in the paragraph immediately preceding this paragraph are granted.

Petitioners are required to offer an identical curriculum at all of the district's elementary, junior high and senior high schools; to maintain substantially the same teacher-pupil ratios for each grade in all of the district's schools; to maintain substantially the same level of expenditures of public funds per pupil at all of the district's elementary schools, each of the district's junior high schools, and at each of the district's senior high schools.

Those requirements—which are a part of the court's order of August 10, 1965—make certain that no school in the district will be inferior to any other school in the district. But lest this court be misled into believing what respondents say about what were formerly the Negro schools of the district, petitioners—with understandable pride—call attention to these facts:

Every school in the district is fully accredited, with every so-called Negro school graded AA. (See Answer to Interrogatory 3G in 2nd Set of Interrogatories.)

Every school in the district is a member of the Southern Association of Colleges and Schools. (See Answer to Interrogatory 3G in 2nd Set of Interrogatories.) But one other school system in Mississippi can make that claim.

Every Negro teacher in the system possesses a Class A or Class AA professional certificate (R. 186).

Teacher salaries, pursuant to a program adopted several years before the beginning of this action, have been equalized. (See Answer to Interrogatory 8D in 2nd Set of Interrogatories.)

There is no real difference in the courses offered throughout the system and any course really desired by pupils in any of the schools is provided. (See Answer to Interrogatory 3F in 2nd Set of Interrogatories.)

There is no overcrowding in any of our schools.

The orders of the District Court approving petitioners' plan and putting it into effect were made and entered on August 10, 1965, and December 10, 1965. Respondents' appeal therefrom was argued before the Circuit Court of Appeals for the Fifth Circuit on May 25, 1966. On March 6, 1969, more than 33 months thereafter, and largely on the basis of decisions in "freedom-of-choice" cases, the Court of Appeals reversed the orders of the District Court by the order which petitioners pray this Court to review.

The questions presented for review are unquestionably the most important questions in the field of school law.

## REASONS FOR ALLOWANCE OF THE WRIT

There are many reasons why the decision below should be reviewed by this Court:

First, it is in conflict with the decisions of the Seventh, Tenth, Fourth and Sixth Circuit Courts of Appeals on the same matter.

Second, it decides important questions of federal law which, if not decided by *Brown*, has not been, but should be, settled by this Court.

Third, it decides important questions of federal law in a way which, if those questions were decided by *Brown*, as we believe, is in conflict with the applicable decisions of this Court, particularly those in *Brown*.

Fourth, it violates the express provisions of the *Civil Rights Act of* 1964.

Fifth, it is based on an untenable and erroneous construction of the *Fourteenth Amendment to the Constitution of the United States.*

Sixth, it does not accord with the applicable decisions of this Court and the other Circuit Courts of Appeals.

Seventh, it is erroneous and its probable results will be so mischievous as to make a "shambles" of public education throughout the nation.

**Brown Directed, As the Means of Achieving the Desegregation of the Schools of a District, the Creation of Compact Attendance Areas or Zones**

This Court, in *Brown*, authorized the lower federal courts to consider—

> ". . . problems related to administration, arising from the physical condition of the school plant, the school transportation system, *revision of school districts and attendance areas into compact units* to achieve a system of determining admission to the public schools on a nonracial basis." (Emphasis added).

The sort of attendance areas which this court had in mind was indicated in one of the questions propounded for reargument as attendance areas resulting from

"normal geographic school districting."

And those words have been almost unanimously construed by the courts as authorization for attendance

areas or zones honestly and conscientiously constructed without regard for race, and as requiring the disapproval of attendance areas gerrymandered for racial purposes.

Respondents, whose contentions in this case are voiced by the NAACP, should have no quarrel with that construction of those words. For in the brief filed by the NAACP in *Brown II*, it was stated on page 12:

> "The extent of the boundary alterations required, in the reformulation of school attendance areas on a nonracial basis, will vary. This is illustrated by the recent experience in the District of Columbia in recasting attendance boundaries on a wholly geographical basis. *In the neighborhoods where there is little or no mixture of the races, and where school facilities have been fully utilized,* it was found that the *elimination of the racial factor did not work any material change in the territory served by each school.*" (Emphasis supplied).

Petitioners, in fashioning the plan now before this Court, have also so construed those words of this Court.

**Brown Requires the Creation of School Systems Not Based on Color Distinctions**

In *Brown II*, this Court directed school boards "to achieve a system of determining admission to the public schools on a nonracial basis."

That the systems to be created pursuant to its directions should be free of racial considerations was made clear by this Court in one of the questions propounded for reargument when it described the sort of system it desired as—

> "a system not based on color distinctions."

The "separate but equal" doctrine repudiated in *Brown* was, as we all know, the legal basis for segregation. It

had its genesis in the majority opinion in *Plessy* v. *Ferguson*, 163 U.S. 537, 41 L. Ed. 256, wherein a Louisiana statute regulating the privileges of passengers on public carriers by race was held not to violate the fourteenth amendment. Its antithesis, i.e., the doctrine that the right of any citizen to enjoy the privileges of a public institution to which he is otherwise entitled cannot be made to depend on his race or color—which *Brown* established as the law of the land for all public school districts—was thus expressed in the dissenting opinion of Mr. Justice Harlan:

> "In respect of civil rights, common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights. . . . I deny that any legislative body or judicial tribunal may have regard to the race of citizens when the civil rights of those citizens are involved.
>
> "These notable additions to the fundamental law (the 13th, 14th and 15th Amendments to the Constitution of the U.S.) were welcomed by the friends of liberty throughout the world. They removed the race line from our governmental systems.
>
> "There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. . . . The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved."

When the transfer provisions incorporated into the desegregation plans of the public school systems of Knoxville, Tennessee, which were based solely on racial factors, came on for review in *Goss* v. *Board of Education*, 373 U.S. 683, 10 L. Ed. 2d 632, this Court, in invalidating them, bor-

rowed from the language in one of its prior decisions to say—

> "Racial classifications are 'obviously irrelevant and invidious.'"

And then went on to capsulize a history of those of its decisions which demonstrated its animosity toward racial classifications:

> ". . . The cases of this Court reflect a variey of instances in which racial classifications have been held to be invalid, e.g., public parks and playgrounds, Watson v. Memphis, 373 U.S. 526, 10 L. Ed. 2d 529, 83 S. Ct. 1314 (1963); trespass convictions, where local segregation ordinances pre-empt private choice, Peterson v. Greenville, 373 U.S. 244, 10 L. Ed. 2d 323, 83 S. Ct. 1119 (1963); seating in courtrooms, Johnson v. Virginia, 373 U.S. 61, 10 L. Ed. 2d 195, 83 S. Ct. 1053 (1963); restaurants in public buildings, Burton v. Wilmington Parking Authority, 365 U.S. 715, 6 L. Ed. 2d 45, 81 S. Ct. 856 (1961); bus terminals, Boynton v. Virginia, 364 U.S. 454, 5 L. Ed. 2d 206, 81 S. Ct. 182 (1960); public schools, Brown v. Board of Education, 347 U.S. 483, 98 L. Ed. 873, 74 S. Ct. 686, 38 A.L.R. 2d 1180, supra; railroad dining car facilities, Henderson v. United States, 339 U.S. 816, 94 L. Ed. 1302, 70 S. Ct. 843 (1950); state enforcement of restrictive covenants based on race, Shelley v. Kraemer, 334 U.S. 1, 92 L. Ed. 1161, 68 S. Ct. 836, 3 A.L.R. 2d 441 (1948); labor unions acting as statutory representatives of a craft, Steele v. Louisville & N. R. Co., 323 U.S. 192, 89 L. Ed. 173, 65 S. Ct. 226, supra; voting, Smith v. Allwright, 321 U.S. 649, 88 L. Ed. 987, 64 S. Ct. 757, 151 A.L.R. 1110 (1944); and juries, Strauder v. West Virginia, 100 U.S. 303, 25 L. Ed. 664 (1879)."

It followed with a gist of a decision by the Court of Appeals for the Fifth Circuit:

". . . *The recognition of race* as an absolute criterion for granting transfers which operate only in the direction of schools in which the tranferee's race is in the majority *is* no less *unconstitutional* than its use *for original admission* or subsequent assignment *to public schools.* See Boson v. Rippy, 285 F. 2d 43 (C.A. 5th Cir.)." (Emphasis added).

In that case which this Court cited with approval, the Court of Appeals for the Fifth Circuit said:

". . . Negro children have no constitutional right to the attendance of white children with them in the public schools. Their constitutional right to 'the equal protection of the laws' is the right to stand equal before the laws of the State; that is, to be treated simply as individuals without regard to race or color. The dissenting view of the elder Mr. Justice Harlan in Plessy v. Ferguson, 1895, 163 U.S. 537, 559, 16 S. Ct. 1138, 1146, 41 L. Ed. 256, has been proved by history to express the true meaning of our Constitution:

"'. . . There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.'"

Many other decisions from this and other courts could be cited to the same effect, but one will suffice. It is that of *Collins* v. *Walker,* 328 F. 2d 100, wherein the Court of Appeals for the Fifth Circuit ruled that a grand jury upon which Negroes had been purposely *included* was as unconstitutional as one from which they had been purposely *excluded.* The court said:

> "A Negro is entitled to the equal protection of the laws, no less and no more. He stands equal before the law, and is viewed by the law as a person, not as a Negro."

Hence, as the foregoing cases show, petitioners, in carrying out the mandate of *Brown,* which was to admit children to the schools of the district on a nonracial basis, were enjoined to disregard the face of every school child in the district, to look on every pupil simply as a pupil and not as a white pupil or a Negro pupil. They were obliged to come up with the same segregation plan as they would have produced had all of the pupils of the district been white, or all colored, or had every other residence in the district been occupied by whites and every other been occupied by Negroes. As the record shows, that is exactly what they did.

**De Facto Segregation—Which Occurs Fortuitously Because of Housing Patterns—According to Brown and the Holdings of the Seventh, Tenth, Fourth and Sixth Circuit Courts of Appeals, Does Not Make an Otherwise Acceptable Desegregation Plan Unconstitutional.**

As we have pointed out, the directives of this Court for the construction of attendance areas or zones, as set forth in *Brown,* are—

> First, the attendance areas or zones must be "compact units," and
>
> Second, the system thus created must be "a system not based on color distinctions."

*Brown* necessarily was to the effect that de facto segregation—that which occurs fortuitously because of housing patterns—does not make an otherwise acceptable desegregation plan unconstitutional. For if an area around a school is inhabited solely by whites or blacks, the cre-

ation of the "compact units" required by *Brown* will necessarily result in racially imbalanced attendance areas or zones. And only by the drawing of zone lines without regard to color can "a system not based on color considerations" be devised. For only if attendance areas or zones are set up as they should be: through the drawing of reasonable, rational and nonracial lines, without regard to the race of the pupils enclosed thereby, will admissions to the school of that zone be determined on a nonracial basis, i.e., the residence of the pupils. But if the boundaries of the attendance areas or zones must be gerrymandered so as to include certain pupils within the zone who would not be included therein if those boundary lines were drawn in a reasonable, rational and nonracial fashion, then the admission into the school of the zone of those pupils artificially brought into the zone will be based on racial considerations, in defiance of the command of *Brown.*

From the very beginning—in fact, in *Brown* after remand to the trial court—it has been held that if attendance areas or zones are fairly arrived at, and all children living in each attendance area or zone are required to attend the school in that area or zone, no violation of the Fourteenth Amendment results even though the concentration of children of one race in particular areas or zones results in racial imbalance in the schools. *Brown* v. *Board of Education of Topeka,* 139 F. Supp. 468. To quote from the trial court's opinion:

> "It was stressed at the hearing that such schools as Buchanan are all-colored schools and that in them there is no intermingling of colored and white children. Desegregation does not mean that there must be intermingling of the races in all school districts. It means only that they may not be prevented from intermingling or going to school together because of race or color.

"If it is a fact, as we understand it is, with respect to Buchanan School that the district is inhabited entirely by colored students, no violation of any constitutional right results because they are compelled to attend the school in the district in which they live."

At least four Courts of Appeals have reached the same conclusion. The Seventh, in *Bell* v. *School City of Gary, Ind.*, 324 F. 2d 209 (certiorari denied 377 U.S. 924, 12 L. Ed. 2d 216), which first appeared in 213 F. Supp., at page 819, was presented the question whether the schools of Gary, with some having all-white and some all-colored student bodies, met the requirements of *Brown*. After pointing out that the composition of those student bodies was the result of the concentration of the city's Negroes in certain sections, the court added:

"Plaintiffs argue that Brown v. Board of Education, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873, proclaims that segregated public education is incompatible with the requirements of the Fourteenth Amendment in a school system maintained pursuant to state law. However, the holding in Brown was that the forced segregation of children in public schools solely on the basis of race, denied the children of the minority group the equal protection of the laws granted by the Fourteenth Amendment.

"We approve . . . the statement in the District Court's opinion, 'Nevertheless, I have seen nothing in the many cases dealing with the segregation problem which leads me to believe that the law requires that a school system developed on the neighborhood school plan, honestly and conscientiously constructed with no intention or purpose to segregate the races, must be destroyed or abandoned because the resulting effect is to have a racial imbalance in certain schools where the district is populated almost entirely by Negroes or whites. * * *'"

The Tenth Circuit Court of Appeals reached the same conclusion in *Downs* v. *Board of Education of Kansas City*, 336 F. 2d 988 (certiorari denied 380 U.S. 914, 13 L. Ed. 2d 800), which involved a broad attack on the administration of the Kansas City, Kansas, school system, and particularly on the action of the school board in defining school boundary lines and requiring students to attend the school in the district in which they lived, with the result that some of the schools were all-white and some all-Negro. But, said the court:

> "The neighborhood school system and other school systems, by which admission to the school is determined upon the basis of similar criteria such as residence and aptitude, are in use in many parts of the country. . . . In the second Brown case, supra, the Supreme Court appears to have recognized that school admissions may be based upon such factors as residence. It said that in determining 'good faith compliance at the earliest practicable date,' the lower courts might take into account problems arising from the '* * * revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis * * *.
>
> "The drawing of school zone lines is a discretionary function of a school board and will be reviewed only to determine whether the school board acted arbitrarily.
>
> "We conclude that the decisions in Brown and the many cases following it do not require a school board to destroy or abandon a school system developed on the neighborhood school plan, even though it results in a racial imbalance in the schools, where, as here, that school system has been honestly and conscientiously constructed with no intention or purpose to maintain or perpetuate segregation."

The Fourth Circuit Court of Appeals reached the same conclusions in *Gilliam* v. *School Board of the City of Hopewell*, Va., 345 F. 2d 325, which involved a neighborhood school plan which inevitably resulted in some all-Negro schools because of "the fact that the surrounding residential areas are inhabited entirely by Negroes." In rejecting the objections thereto, the court said:

> "The plaintiffs object that the result of the geographic zoning is a large measure of de facto segregation. It is true that it is, but this is because of the residential segregation that exists. The Harry E. James School zone, for instance, bounded in part by Hopewell's city limits, is otherwise largely surrounded by railroad classification yards and industrial tracks, with adjacent industrialized areas, which isolate the residential portions of that zone from all other residential areas. De facto segregation could be avoided for those pupils only by transporting them to distant schools.
>
> "The Constitution does not require the abandonment of neighborhood schools and the transportation of pupils from one area to another solely for the purpose of mixing the races in the schools."

*Deal* v. *Cincinnati Board of Education*, 369 F. 2d 55, decided by the Sixth Circuit Court of Appeals on December 6, 1966, is also to the same effect. In it, the appellants posed the question—

> "Whether the neighborhood system of pupil placement, fairly administered without racial bias, comports with the requirements of equal opportunity if it nevertheless results in the creation of schools with predominantly or even exclusively Negro pupils."

In responding, the court said:

> "The neighborhood system is in wide use throughout the nation and has been for many years the basis

of school administration. This is so because it is acknowledged to have several valuable aspects which are an aid to education, such as minimization of safety hazards to children in reaching school, economy of cost in reducing transportation needs, ease of pupil placement and administration through the use of neutral, easily determined standards, and better home-school communication. The Supreme Court in *Brown* recognized geographic districting as the normal method of pupil placement and did not foresee changing it as the result of relief to be granted in that case.

"Because of factors in the private housing market, disparities in job opportunities, and other outside influences (as well as positive free choice by some Negroes), the imposition of the neighborhood concept on existing residential patterns in Cincinnati creates some schools which are predominantly or wholly of one race or another. Appellants insist that this situation, which they concede is not the case in every school in Cincinnati, presents the same separation and hence the same constitutional violation condemned in *Brown*. We do not accept this contention. *The element of inequality in Brown was the unnecessary restriction on freedom of choice for the individual, based on the fortuitous, uncontrollable, arbitrary factor of his race.* The evil inherent in such a classification is that it fails to recognize the high value which our society places on individual worth and personal achievement. Instead, a racial characterization treats men in the mass and is unrelated to legitimate governmental considerations. It fails to recognize each man as a unique member of society.

*"In the present case, the only limit on individual choice in education imposed by state action is the use of the neighborhood school plan. Can it be said that this limitation shares the arbitrary, invidious characteristics of a racially restrictive system? We think*

> *not.* In this situation, while a particular child may be attending a school composed exclusively of Negro pupils, he and his parents know that he has the choice of attending a mixed school if they so desire, and they can move into the neighborhood district of such a school. This situation is far removed from *Brown,* where the Negro was condemned to separation, no matter what he as an individual might be or do. Here, if there are obstacles or restrictions imposed on the ability of a Negro to take advantage of all the choices offered by the school system, they stem from his individual economic plight, or result from private, not school, prejudice. We read *Brown* as prohibiting only enforced segregation." (Emphasis supplied).

The Sixth Circuit Court of Appeals, on February 10th of this year, reaffirmed its holding in *Deal.* In *Goss* v. *Board of Education, City of Knoxville, Tennessee,* 406 F. 2d 1183, it had this to say of a plan which required each student to be assigned to the school in the district in which he or she resides;

> "Preliminarily answering question I, it will be sufficient to say that the fact that there are in Knoxville some schools which are attended exclusively or predominantly by Negroes does not by itself establish that the defendant Board of Education is violating the constitutional rights of the school children of Knoxville. Deal v. Cincinnati Bd. of Education, 369 F. 2d 55 (6th Cir. 1966), cert. denied, 389 U.S. 847, 88 S. Ct. 39, 19 L. Ed. 2d 114 (1967); Mapp. v. Bd. of Education, 373 F. 2d 75, 78 (6th Cir. 1967). Neither does the fact that the faculties of some of the schools are exclusively Negro prove, by itself, violation of *Brown.*"

And there are comparatively recent district court cases from the Fifth Circuit to the same effect. *Griggs* v. *Cook,* 272 F. Supp. 163 (N.D. Georgia, July 21, 1967), affirmed by the court in 384 F. 2d 705, clearly recognizes

that there is nothing unconstitutional or illegal about fortuitous de facto segregation. We quote:

> ". . . the sole question here is whether the location of a neighborhood school, *ipso facto*, is unconstitutional, because it will result in a predominantly all-negro enrollment. Short of racially motivated action in the manipulation of attendance patterns or 'gerrymandering' of school districts, and prior to *Jefferson County*, the matter appeared to be at rest under such cases as Bell v. School City of Gary, 213 F. Supp. 819 (N.D. Ind. 1963), aff'd 324 F. 2d 209 (7th Cir. 1963), cert. den. 377 U.S. 924, 84 S. Ct. 1223, 12 L. Ed. 2d 216 (1964), and Briggs v. Elliott, 132 F. Supp. 776 (E.D.S.C. 1955); Holland v. Board of Public Instruction, 258 F. 2d 730 (5th Cir. 1958); Deal v. Cincinnati Board of Education, 369 F. 2d 55 (6th Cir. 1966).
>
> "The dilemma arises from the legal application of a decree directed at de jure situations upon facts which plaintiffs themselves assert are *de facto* problems. It is apparent to all that the difficulty here arises out of residential racial patterns in the City of Atlanta. That such residential segregation actually produces educational segregation and renders the task of school integration extremely difficult is obvious. However, it is impossible for the court in this action to abolish the Atlanta housing problem by judicial solution of the school problem. Such result must await effective legislation and social maturity on the part of many parties not remotely concerned with this suit.
>
> . . . .
>
> ". . . What is decided is that the establishment of a school on nonracially motivated standards is not unconstitutional because it fortuitously results in all-negro or all-white enrollment."

In *Moses* v. *Washington Parish School Board,* 276 F. Supp. 834 (E.D. La., Oct. 26, 1967), it was said:

> ". . . This Court's considered position is that separation *which occurs fortuitously* is *not* 'inherently' unequal.
>
> ". . . this Court cannot sanction a rule of law which places the *legal burden* on the state to correct the effects on one class of individuals of chance occurrences or of the free exercise by another group of their rights of free association."

*Broussard* v. *Houston Independent School District,* 395 F. 2d 817, decided May 30, 1968, by a three-judge court, rejected the contention that the construction of new schools should be halted because they might promote and perpetuate de facto segregation in the schools.

> "The Constitution does not require such a result, and we entertain serious doubt that it would permit it. Racial imbalance in a particular school does not in itself, evidence a deprivation of constitutional rights. Zoning plans fairly arrived at have been consistently upheld, though racial imbalance might result."

We live in a pluralistic society. Our communities are as diverse as the races and the ethnic groups which populate them. All-white communities abound in sections outside the South. A few all-Negro communities can be found in the South. Towns made up of French-speaking citizens exist in Louisiana. Scandinavian groups compose communities located in the Mid-West. Perhaps the same can be said about German and Italian groups. For this country has provided a refuge for those of every race and nationality, with no restrictions on where they should settle. And since like attracts like, our various racial and ethnic

groups have inevitably moved into those communities which numbered among their inhabitants those of their own group and have shunned those communities which do not have those of their background. For instance, while Mississippi has, along with its many Anglo-Saxons, those of German and Italian stock, it has no Scandinavians or Poles. It has Chinese but not Japanese. And other illustrations could be given.

Where communities have sizable racial or ethnic groups, those groups tend to congregate in identifiable sections of their community. In parts of Boston, none but Irish can be found. The same can be said of New York, which also includes sections composed exclusively of Italians. In San Francisco, Chinese have their own part of the city. Those are but examples of a phenomena well known to those familiar with American communities. Other such examples can easily be given.

Negroes have the same tendencies as the white groups. Where they form a sizable proportion of the population, whether it be in the South, North, East or West, they naturally, and of their own volition, create their own neighborhood. It can be safely said that there is not a community in this country where Negroes, if there are enough of them, do not congregate into a particular section of their community. The instincts which motivate their white counterparts to do so, also impel Negroes to live together.

Such de facto segregation as exists in Clarksdale is, of course, the fortuitous result of the housing patterns in the community. But those housing patterns did not result from any state law or local ordinance, as did the housing patterns in the community under consideration in *Holland* v. *Board of Public Institutions*, 258 F. 2d 730. The fact of the matter is that they are the result of the natural desires of people to live near those of their own kind.

There is some de facto segregation in Clarksdale, just as there is in every community in this nation where there is a sizable proportion of Negro population. Given the housing patterns which prevail in towns and cities throughout the country, any other result would be inconceivable. But the de facto segregation found in Clarksdale is fortuitous de facto segregation and not the result of any law or ordinance. It is, in every essential respect, the same type of de facto segregation as prevails in Gary, Indiana, which was before the court in *Bell*; as prevails in Kansas City, Missouri, which was before the court in *Downs*; as prevails in Hopewell, Virginia, which was before the court in *Gilliam*; as prevails in Cincinnati, Ohio, which was before the court in *Deal*; as prevails in Knoxville, Tennessee, which was before the court in *Goss* v. *Board of Education, City of Knoxville, Tennessee*, 406 F. 2d 1183; as prevails in Houston, Texas, which was before the court in *Broussard* v. *Houston Independent School District*, 262 F. Supp. 266; as prevails in Atlanta, Georgia, which was before the court in *Griggs* v. *Cook*, 272 F. Supp. 163, 384 F. 2d 705; as prevails in Washington Parish, Louisiana, which was before the court in *Moses* v. *Washington Parish School Board*, 276 F. Supp. 834; and as prevails in numerous other communities whose plans have been validated by the courts even though they encompassed areas where de facto segregation prevailed.

Where such de facto segregation exists, and a district's zones are set up as they should be: through the drawing of reasonable, rational and nonracial lines, without regard to the race of the pupils enclosed thereby, there will be, of necessity, some all-black and some all-white schools. There is no escape from such an inevitable result, except the racist solution advanced by the court below. But neither race, nor religion, should be acknowledged as constituting in any way a valid condition or measure, in this

nation, of a person's access to public facilities, positions or activities of any sort. Those who would make it such ought to be rejected with finality because, in racial matters, enduring progress and justice will come about only under rules of law which unswervingly treat all men as equal before the law, regardless of race, color or national origin.

**The Civil Rights Act of 1964 Validates Bona Fide Neighborhood School Lines and Prohibits Court Orders Intended to Alleviate Racial Imbalance in Neighborhood Schools**

As we have pointed out, *Bell* v. *School City of Gary* holds that de facto segregation which occurs fortuitously because of housing patterns is not unconstitutional. Now we point out that the gist of that holding was incorporated into the *Civil Rights Act of 1964*. This is clear from the language of Senator Humphrey, floor manager of the bill, as quoted in *Jefferson 1* (372 F. 2d 836):

"Senator Humphrey explained:

> " 'Judge Beamer's opinion in the *Gary* case is significant in this connection. In discussing this case, as we did many times, *it was decided to write the thrust of the court's opinion into the proposed substitute.*' (Emphasis added).
>
> . . .
>
> " '*The bill does not attempt to integrate the schools,* but it does attempt to eliminate segregation in the schools. The natural factors, such as density of population, and the distance that students would have to travel are considered legitimate means to determine the validity of a school district, *if the school districts are not gerrymandered, and in effect deliberately segregated. The fact that there is a racial imbalance per se is not something which is unconstitutional.* That is why we have attempted to clarify it with the language of Section 4.' (Emphasis added)."

The pertinent provisions of the *Civil Rights Act of 1964* are, of course, *Sections 401, 407* and *410*, which read as follows:

> "Sec. 401. As used in this title—
>
> "(b) 'Desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance.
>
> "Sec. 407 . . .
>
> ". . . nothing herein shall empower any official or court of the United States to issue any orders seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance.
>
> "Sec. 410.
>
> "Nothing in this title shall prohibit classification and assignment for reasons other than race, color, religion, or national origin."

In defining the latter part of *Section 401*—

> "but desegregation shall not mean the assignment of students to public schools in order to overcome racial imbalance,"

the Court of Appeals for the Fifth Circuit, in *Jefferson 1*, said:

> "The negative portion, starting with 'but', excludes assignment to overcome racial imbalance, that is acts to overcome de facto segregation."

In support of its conclusion that the prohibition in *Section 407* against assignment of students to overcome racial imbalance was related solely to racial imbalance resulting from de facto segregation, the Court, in *Jefferson 1,* went on to say this about the undefined term "racial imbalance":

> "It is clear however from the hearings and debates that Congress equated the term, as do commentators, with 'de facto segregation' that is, non-racially motivated segregation in a school system based on a single neighborhood school for all children in a definable area."

In recognition of the fact that "classification and assignment for reasons other than race, color, religion, or national origin," as used in *Section 410,* includes classification and assignment on the basis of residence, the Court, in *Jefferson 1,* said:

> "The thrust of the *Gary* case (*Bell*) was that if school districts were drawn without regard to race, but rather on the basis of such factors as density of population, travel distances, safety of the children, costs of operating the school system, and convenience to parents and children, those districts are valid even if there is a racial imbalance caused by discriminatory practices in housing."

When the Court of Appeals for the Fifth Circuit decided in *Jefferson 1,* as it had to do, that the thrust of *Bell* had been written into the *Civil Rights Act of 1964* and that the *Act* applies, at the very least, to those school districts whose zone lines are drawn without regard to race, but rather on the basis of such factors as density of population, travel distances, safety of the children, cost of operating the school system, and convenience to parents and children, it decided, beyond all question, that the *Act* applies to the Clarksdale Municipal Separate School District. For

petitioners' zones are set up exactly as were the zones in *Bell.*

It follows therefore, from the decision in *Jefferson 1* and the express words of the *Civil Rights Act of 1964,* that petitioners' attendance areas or zones are valid even if there is a racial imbalance therein and that the court was without authority to issue any order designed to achieve a racial balance in petitioners' schools.

**The Constitutionality of an Attendance Area Desegregation Plan is to Be Judged by the Decisions in Those Cases Dealing with Such Plans. It Is Not to Be Judged by Decisions Dealing with "Freedom-of-Choice" Plans, for Those Decisions Are Based on Considerations Foreign to Attendance Area Plans.**

The plan before the court is unique in that no other school district in the Fifth Circuit has initially proposed to do exactly that which is required by *Brown,* to-wit: to abolish its dual zone lines, to revise its attendance areas into compact units, and to establish a system of determining admissions to its schools on a nonracial basis, without including in its proposal an escape provision whereby a white pupil in a predominantly black neighborhood could avoid the school for that zone and attend a school designated for a different zone. As Judge Tuttle put it in *Davis* v. *Board of School Commissioners of Mobile County,* 364 F. 2d 896—

> "As every member of this court knows, there are neighborhoods in the South and in every city of the South which contain both Negro and white people. So far as has come to the attention of this court, no Board of Education has yet suggested that *every* child be required to attend his 'neighborhood school' if the neighborhood school is a Negro school. Every board of education has claimed the right to assign every white child to a school other than the neighborhood school under such circumstances."

Judge Tuttle simply didn't know about the plan now before this court, which was then before another panel of his court.

In the plan before the court every pupil is required to attend the school in his or her zone with the exception that students desiring to take a course not offered at the school he or she attends but offered at another school are allowed to transfer to the latter school. That exception is nullified for all practical purposes by the requirement that identical curriculum be offered at all of the district's elementary, junior high and senior high schools. During the five years the plan has been in operation, not a single white pupil has taken advantage of that exception, nor been excused from his or her initial assignment under the plan. In sum, the plan before the court has no transfer provisions such as that which led this court to equate the plan in *Monroe* v. *Board of Commissioners of the City of Jackson, Tennessee*, 391 U.S. 450, 20 L. Ed. 2d 733, with a "freedom-of-choice" plan, and no gimmick such as those referred to by Judge Tuttle in *Davis*.

Since the plan before the court is a bona fide attendance area plan, and uncontaminated with "freedom-of-choice" provisions, it should, we submit, be judged by the decisions in those cases dealing with attendance area plans. In particular, it should be judged by what this court said in *Brown*, for what this court had in mind when deciding *Brown* was the organization and operation of school districts by the establishment of attendance areas, with single rather than dual lines, and with admissions determined by the residences of the pupils.

Of course, primarily *Brown* called for the achievement of a system of determining admissions to the public schools on a nonracial basis. But it contemplated that such result would be obtained through revision of school districts and

attendance areas into compact units. For it directed the lower courts to consider, in determining whether a school district's efforts were consistent with good faith compliance at the earliest possible date,

> "problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, *revision of school districts and attendance areas into compact units* to achieve a system of determining admission to the public schools on *a nonracial basis.*" (Emphasis supplied).

At the time *Brown* was decided, pupils everywhere were required to attend their neighborhood school. Hence it is certain that what *Brown* contemplated was the elimination of dual zone lines and the drawing of single zone lines around each school, with the new attendance areas to be the "compact units" which result from "normal geographic school districting," coupled with the requirement that every pupil be required to attend that school located in the zone of his residence. The resulting school systems would not be based on "color distinctions." Districts so organized and operated would have a system of determining admissions on a nonracial basis.

What we have just said was better said in *Moses* v. *Washington Parish School Board,* 276 F. Supp. 834:

> ". . . One need not go back more than three or four years in time to find the school systems in the South operating, along with those in the rest of the nation, smoothly and efficiently. In the days before the impact of the *Brown* decision began to be felt, pupils were assigned to the school (corresponding, of course, to the color of the pupils' skin) nearest their homes; once the school zones and maps had been drawn up, nothing remained to be done but to inform the community of the structure of the zone boundaries. Upon the rendition of the *Brown* decision and the issuance of the ultimatum to abolish the segregated dual zones in each

school district, it was natural for the citizenry to expect to see the old coterminous dual zones abolished, and single independent zones drawn up around each school in each district."

After *Brown* was decided, most Southern school districts took the first step required by that decision, i.e., the elimination of their dual zone lines. But practically none of them took the second step required, i.e., the establishment of single zone lines around each school, so as to create new compact units as attendance centers. Instead, the idea which culminated in the "freedom-of-choice" plan appeared on the scene and was embraced as an excuse for not meeting the second requirement of *Brown*.

Beyond peradventure, the "freedom-of-choice" method of operating schools was not that called for by *Brown*. Equally clear was the fact that "freedom-of-choice" is a "haphazard" way of administering a school system. *Singleton* v. *Jackson Municipal Separate School District*, 355 F. 2d 865. "When attempted on a permanent basis," according to *Moses*, "the system becomes so unworkable as to be ridiculous." But its real defect, as viewed by the courts, was that it transferred the burden of achieving a system of admissions to public schools on a nonracial basis from the school boards, where the courts felt it belonged, to the parents of black pupils, and that the parents of black pupils, in the opinion of the courts, were so conditioned by their heritage that they were incapable of exercising their choices in a free and unfettered manner. Hence the usefulness of "freedom-of-choice" plans had to be limited to the interim period required for the transition to a school system impartially zoned on a geographic and nondiscriminatory basis. In other words, school districts were simply given the *privilege* of operating under "freedom-of-choice" plans for a limited pe-

riod. They never had the *right* so to operate their schools. To quote from *Moses* again:

> "Obviously there is no constitutional 'right' for any student to attend the public school of his own choosing. But the extension of the *privilege* of choosing one's school, far from being a 'right' of the students, is not even consistent with sound school administration."

The question presented in cases involving "freedom-of-choice" plans was whether, and on what conditions, the defendant district would be permitted to operate its schools by a method designed to avoid the zoning requirements of *Brown*. Such question is, of course, vastly different from the question of whether a district organized and operating under an attendance area plan has defined its attendance areas or zones on the nonracial basis called for by *Brown*. Thus cases such as *Green* v. *County School Board of New Kent County, Va.*, 391 U.S. 430, 20 L. Ed. 2d 716, and *United States* v. *Jefferson County Board of Education*, 372 F. 2d 836; 380 F. 2d 385, both "freedom-of-choice" cases, and cases of that ilk, have no bearing on the question of the constitutionality of the plan now before this court.

In *Green*, according to this court—

> "The question for decision (was) whether, under all the circumstances here, respondent School Board's adoption of a 'freedom-of-choice' plan which allows a pupil to choose his own public school constitutes adequate compliance with the Board's responsibility 'to achieve a system of determining admissions to the public schools on a nonracial basis. . . .'"

That the answer to that question did not depend on facts which are present in zone cases such as this, is amply shown by this paragraph from the court's opinion:

> "There is no residential segregation in the county; persons of both races reside throughout. The school system has only two schools. the New Kent school on the east side of the county and the George W. Watkins school on the west side. . . . The School Board operates one white combined elementary and high school (New Kent), and one Negro combined elementary and high school (George W. Watkins). There are no attendance zones. Each school serves the entire county."

The first paragraph in *Raney* v. *Board of Education*, 391 U.S. 443, 20 L. Ed. 2d 727, shows that it is subject to the same comments as were applied to *Green*:

> "This case presents the question of the adequacy of a 'freedom-of-choice' plan as compliance with Brown v. Board of Education, 349 U.S. 294, 99 L. Ed. 1083, 75 S. Ct. 753 (Brown II), a question also considered today in Green v. County School Board of New Kent County, 391 U.S. 430, 20 L. Ed. 2d 716, 88 S. Ct. 1689. The factual setting is very similar to that in Green."

In *Monroe* v. *Board of Commissioners*, 391 U.S. 450, 20 L. Ed. 2d 733, the question, according to the court, was similar to the question decided in *Green* and *Raney* in that the "free transfer" provision in the plan then before the court, which operated as a device to allow resegregation of the races to the extent desegregation would be achieved by geographically drawn zones, converted the plan into what was essentially a "freedom-of-choice" plan, subject to the same tests as were applied in *Green* v. *Raney*.

*Jefferson*, which the court below leaned on so heavily, was concerned solely with "freedom-of-choice" plans, a fact that is emphasized by the fact that this case was argued in the court below in conjunction with the *Jefferson* cases and yet was not covered by the decision therein. In addition, it specifically stated that it was not concerned with cases such as this case.

> "We leave the problem of *de facto* segregation in a unitary system to solution in appropriate cases by the appropriate courts."

And it further distinguished the "freedom-of-choice" cases it was dealing with and cases such as this case by holding that *Sections 401, 407* and *410* of the *Civil Rights Act of 1964* do not apply to "freedom-of-choice" plans but do apply to plans such as the plan now before this court.

Because the question before the courts in "freedom-of-choice" cases was vastly different from the question which was before the court below in this case, and because the facts in "freedom-of-choice" cases bear no relationship to the facts in this case, we submit that the constitutionality of petitioners' plan should not have been judged in the light of language found in "freedom-of-choice" cases.

## CONCLUSION

We submit that the decision below, for the several reasons heretofore assigned, should be reviewed by this Court. In particular, we submit that the fundamental question presented herein, i.e., whether the Fourteenth Amendment to the Constitution of the United States requires a school district, in order to bring about racial balance in its schools, to so gerrymander its zone lines as to include pupils of a certain race within an attendance area or zone who would not be included therein if its attendance area or zone lines were drawn in a reasonable, rational and nonracial fashion, should be decided by this Court. It is probably the most important question now troubling the people of this nation, especially now that so many school districts are being required to abandon "freedom-of-choice" and to create attendance areas or zones.

A permanent and universal choice must be made between the mutually exclusive goals of color-consciousness

and color-blindness. The policy of legal segregation, of "separate but equal" facilities for the races, was based on color-consciousness, on classification by race. Now that it has been outlawed by *Brown*, it must be permanently replaced by an enduring and universal principle of even-handed fairness. The principle which meets that requirement, which squares with the correct interpretation of the Fourteenth Amendment to the Constitution of the United States, is that suggested by Mr. Justice Harlan, in his dissent in *Plessy* v. *Ferguson*, that "our Constitution is color-blind and neither knows nor tolerates classes among citizens."

Respectfully submitted,

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## CERTIFICATE OF SERVICE

The undersigned counsel for petitioners hereby certifies that true copies of the foregoing petition have been served on counsel for respondents, by depositing the same in a United States Post Office, with first class postage prepaid, addressed to Hon. Melvyn R. Leventhal, Hon. Reuben V. Anderson, and Hon. Fred L. Banks, Jr., at their post office address: 538 1/2 North Farish Street, Jackson, Mississippi, 39202, and Hon. Jack Greenberg, Hon. Jonathan Shapiro, and Hon. Norman Chachkin, at their post office address: Suite 2030, 10 Columbus Circle, New York, New York, 10019.

Dated: August 27, 1969.

.....

HARDY LOTT
*Counsel for Petitioners*

IN THE

# United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 23255

REBECCA E. HENRY, ET AL.,
Appellants,

VERSUS

THE CLARKSDALE MUNICIPAL SEPARATE SCHOOL DISTRICT, ET AL.,
Appellees.

*Appeal from the United States District Court for the Northern District of Mississippi.*

(March 6, 1969)

Before WISDOM and THORNBERRY, Circuit Judges, and COX,* District Judge.

WISDOM, Circuit Judge: As this case demonstrates, a school board's adoption of a geographic zoning system instead of a "freedom of choice" system is not a guarantee of effective desegregation. "Geographic zoning, like any other attendance plan adopted by a school board in this Circuit, is acceptable only if it tends to disestablish rather

*William Harold Cox, United States District Judge for the Southern District of Mississippi, sitting by designation.

than reinforce the dual system of segregated schools." *United States v. Greenwood Municipal Separate School District,* 5 Cir. 1968, ..... F. 2d ..... In *Davis v. Board of School Commissioners of Mobile County,* 5 Cir. 1968, 393 F.2d 690, we recognized that in many instances geographic zoning offers "administrative improvement and greater desegregation" but required the Board to make a new effort to draw zone lines "on a non-racial basis so that its plan would promote desegregation rather than perpetuate segregation".

Here the district court found that the school board acted in good faith. But good faith does not excuse a board's non-compliance with its affirmative duty to liquidate the dual system. Good faith is relevant only as a necessary ingredient of an acceptable desegregation plan.

In 1964, under court order, the Clarksdale Municipal Separate School District of Mississippi redrew its attendance zones and adopted a geographic zoning system as the basis for desegregating its schools. In the fall of that year, not a single child in Clarksdale was enrolled in any school with members of the other race. Again, for the spring semester of the 1964-65 year, not a single child was enrolled in a school attended by children of the other race. When this case was tried in April 1965, 2800 Negro pupils attended the five "Negro" schools in Clarksdale and 2100 white children attended white schools along with two Negro girls who had transferred to the white high school to obtain a course, Latin, not available in the Negro high school.

In *Jefferson* this Court considered freedom of choice plans in operation in Jackson, Biloxi, and Leake County, Mississippi, and in other parish and county school districts throughout this circuit. *United States v. Jefferson County*

*Board of Education,* 5 Cir. 1966, 372 F.2d 847, aff'd en banc, 380 F.2d 385, cert. denied sub nom. *Caddo Parish School Board v. United States,* 1967, 389 U.S. 840, 88 S.Ct. 72, 19 L.Ed.2d 103. Much of what we said in our opinion in that case applies to any school desegregation plan. We held that school officials have an "affirmative duty" to reorganize their schools into "an integrated, unitary school system in which there are no Negro schools and no white schools—just schools". 380 F.2d at 389. We recognize that freedom-of-choice plans have "serious shortcomings" and suggested a detailed order to attempt to overcome some of the shortcomings. We pointed out, "*The only school desegregation plan that meets constitutional standards is one that works.*" (Original emphasis.) 372 F.2d at 847. Recently, the Supreme Court has underscored a school board's "affirmative duty" today "to come forward with a plan that promises realistically to work, and promises realistically to work *now*". (Original emphasis.) *Green v. County School Board of New Kent County, Virginia,* 1968, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716. In *Green* the Court found that the freedom of choice plan used in New Kent County was ineffective and suggested alternatives, including zoning, that might bring about a "speedier and more effective conversion [of the dual system] to a unitary, nonracial school system".[1]

1. The court carefully stated, "Although the general experience under 'freedom of choice' to date has been such as to indicate its ineffectiveness as a tool of desegregation, there may well be instances in which it can serve as an effective device. Where it offers real promise of aiding a desegregation program to effectuate conversion of a state-imposed dual system to a unitary, nonracial system there might be no objection to allowing such a device to prove itself in operation." Green v. School Board of New Kent County, 391 U.S. at ..... In areas where residential segregation is substantial, freedom of choice or free transfer plans may aid desegregation.

A geographic system of allocating students to schools is a pragmatic solution that avoids the "haphazard"[2] element in administering a freedom of choice plan based on the individual pupil's considered or perhaps capricious selection of a school to attend. A district court in Louisiana recently observed:

> If this Court must pick a method of assigning students to schools within a particular school district, barring very unusual circumstances, we could imagine no method more inappropriate, more unreasonable, more needlessly wasteful in every respect, than the so-called "free-choice" system. Moses v. Washington Parish School Board, E.D. La. 1968, ..... F. Supp. .....

Historically, a compulsory attendance zone system almost invariably prevailed in the school districts in this circuit[3]—until *Brown*[4] ordered an end to school segregation. But an attendance zone plan also may fail to work. When a particular plan does not succeed in converting a dual system into a unitary system, the school board must find ways for the plan to succeed.

The plaintiffs contend that the attendance zone plan in Clarksdale extends promises it cannot fulfill. They allege also that the zones were drawn for the purpose and have had the effect of maintaining the racial identity of each formerly white and formerly Negro school.

The plaintiffs raised additional issues in the district court. One concerned the speed of desegregation to take

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2. See Singleton v. Jackson Municipal Separate School District, 5 Cir. 1966, 355 F.2d 865. 871.

3. See Moses v. Washington Parish School Board, E.D. La. 1967, ..... F.Supp. ..... See also Meador, The Constitution and the Assignment of Pupils to Public Schools, 45 Va. L. Rev. 517 (1959).

4. Brown v. Board of Education (*Brown I*), 1954, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873; Brown II, 1955, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083.

place in Clarksdale. This issue, of course, is settled: The time is *now*. As *Green* puts it, "delays are no longer tolerable . . . [and] a plan that at this late date fails to provide meaningful assurance of prompt and effective disestablishment of a dual system is also intolerable". 391 U.S. at ..... Other issues in the district court involved the qualitative differences between "white" schools and "Negro" schools.[5] *Jefferson* tried to put an end to such differences by requiring integration "lock, stock, and barrel": faculty and staff (part VIII), services, facilities, extracurricular activities and programs (part V), and school equalization (part VI).[6] Similarly, *Green* requires "dismantling" of the state-imposed dual system "root and branch".

The issue on this appeal centers on the geographic zones established by the school board. The record clearly establishes that all pupils living in each zone are required to attend the school in that zone. As we recognized in *Jefferson,* however, such factors as residential patterns, the mushrooming of private schools, and a minority-to-majority transfer policy may bring about a school attended exclusively or almost exclusively by students of one race, although the zone originally etched out to supply students for that school may have been racially mixed.

5. The order of the district court corrected a number of deficiencies in the administration of schools by providing for equalization of curricula, teacher-salary scales, teacher-pupil ratios, and of per pupil expenditures for all schools of each level (elementary, junior high, and high schools). United States v. Bessemer Board of Education, 5 Cir. 1968, ..... F.2d ....., [Nos. 25809, 25810, 25811, May 1968]; Moses v. Washington Parish, E.D. La. 1968, ..... F.Supp. ....., n. 17; HEW Guidelines § 9. The court found merit in the appellants' complaint that teachers were segregated but held that, because of teacher contracts having been signed for the 1965-66 year, faculty desegregation should be temporarily deferred.

6. See especially United States v. Bessemer Board of Education, 5 Cir. 1968, ..... F.2d ..... [Nos. 24809, 25810, 25811, June 3].

Clarksdale is bisected from the northeast to the southwest by a main line of the Illinois Central Railroad track. Commercial and industrial establishments lie adjacent to both the northern and southern side of the railroad tracks, accentuating the division of the residential areas of the town. Elevated tracks on an embankment add to this division.

Clarksdale is also bisected by the Sunflower River running north-south through the city. The southern half of the city is divided by another line of railroad tracks running north-south, which is built on the same grade as the surrounding lands. There are four underpasses and one grade crossing transversing the embanked railroad tracks. Only one of these underpasses is west of the Sunflower River, and it is next to the river. The central business district is in the northern half of Clarksdale, and east of the Sunflower River. Two bridges span the river in both the northern and southern sections of the community.

Traditionally, most Negro residents in the city have lived south of the Illinois Central tracks, while the great majority of the white residents have lived north of the tracks. Under the school board's proposed attendance-zone plan, no school child will cross those tracks. The result was obvious from the beginning: the zoning could produce only token desegregation.

The plaintiffs attempted to prove that the purpose behind the board's drawing of the present zone lines is to perpetuate a dual, segregated school system in Clarksdale.[7]

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7. A zoning ordinance, enacted in July 1964 by the City of Clarksdale, de-annexed the property on East Second Street where the Negroes lived; the City and County purchased and demolished the homes located near the County Jail; and the City purchased and demolished the homes in Tuxedo Park, after annexing adjoining territories containing white residences. The Board denies any knowledge of the City and County action, and city officials maintain that the ordinance was not intended to affect school desegregation.

They allege that certain pockets of Negro residences north of the tracks were purposefully removed through deannexation, purchase, or urban renewal by public authorities so that no Negroes would reside in the attendance zones of the northern half of Clarksdale.[8] We agree

8. The Higgins High School, containing all the Negro pupils in grades 7-12 is located south of these tracks, while the high schools containing all the white public high school pupils are located north of the tracks. Four elementary schools, Oliver, Hall, Washington and Riverton, containing all the Negro elementary pupils are located south of the Illinois Central's tracks. Three of the four elementary schools serving white pupils are located north of the tracks. The fourth elementary school, Eliza Clark, is located in a white residential section south of the tracks. Based on Board statistics provided in March 1965, 865 Negro high school pupils, all but two of the total eligible to attend high school, live south of the Illinois tracks, attend Higgins, and if the Board has its way, will continue at Higgins. The effect of zoning one white and four Negro elementary schools located south of the Illinois Central tracks is that all Negroes will be assigned to schools traditionally serving Negro pupils and the great majority of white pupils will be assigned to the white Eliza Clark School. The three remaining white elementary schools located north of the Illinois Central tracks serve only pupils living north of the tracks. Few if any of these students are Negroes. The Board estimated that in December 1964 only one Negro elementary school child was eligible by reason of residence to attend an elementary school now serving only white pupils. The district court approved the high school zones and the elementary zones located north of the Illinois Central tracks, adding requirements that all school facilities be equalized and that students seeking courses not offered in their assigned schools be given the right to transfer to schools where such courses are offered. The order temporarily approved the school zones located south of the Illinois Central tracks, but required reconsideration of these zones by the board and a resubmission of zones "predicated on efficient utilization of avaliable school facilities on a racially nondiscriminatory basis in accordance with sound education principles". The order further provided that, notwithstanding the elementary subdistricts located north of the Illinois Central tracks had been approved, the Board was free to revise these boundaries if this was necessary to accommodate changes in the elementary attendance zones located south of the Illinois Central tracks. The order awarded costs to appellants and retained jurisdiction of the case for additional orders which might become necessary or appropriate. In October 1965 the Board submitted its revised plan for the elementary attendance zones located south of the Illinois Central tracks. The sole change recommended was that the zone line dividing the white Eliza Clark school from the Negro Myrtle Hall school be eradicated and that, effective in September 1966 all first and second grade pupils in the combined zone be assigned to the Eliza Clark school and all

with the district court that evidence on this issue is irrelevant, but not for the reasons supporting the district judge's conclusion. It is irrelevant because the ultimate inquiry is not whether the school board has found some rational basis for its action, but whether the board is fulfilling its duty to take *affirmative* steps, spelled out in *Jefferson* and fortified by *Green,* to find realistic measures that will transform its formerly de jure dual segregated school system into a "unitary, nonracial system of public education".

In *Monroe* v. *Board of Commissioners of the City of Jackson,* 1968, 391 U.S. 450, 88 S.Ct. 1701, 20 L.Ed.2d 733, a companion case to *Green,* the school board for the city of Jackson, Tennessee, established a plan involving attendance zones drawn according to certain established criteria and containing a free-transfer provision. The schools of Jackson retained their racial identity, with only token integration. The Supreme Court, focusing on the free-transfer aspect of the plan, observed:

> Plainly, the plan does not meet respondent's "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Green* v. *County School Board, supra,* at p. 7. Only by dismantling the state-imposed dual system can that end be achieved. And manifestly, that end has

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pupils in grades three through six be assigned to the Myrtle Hall school. Appellants promptly filed objections to the revised plan, contending that there was no greater justification for retaining the zone lines of the other elementary schools and that, while the eradication of the line between the Myrtle Hall and Eliza Clark zones appeared to have advantages from an educational and desegregational standpoint, the practical effect of assigning the 115 white children from Eliza Clark with the approximate 415 Negro pupils from Myrtle Hall would be that white parents would refuse to send their children to the school and would move their residences to areas north of the Illinois Central tracks where, as the evidence shows, Negroes could not obtain housing.

> not been achieved here, nor does the plan approved by the lower courts for the junior high schools promise meaningful progress towards doing so. . . . That the Board has chosen to adopt a method achieving minimal disruption of the old pattern is evident from its long delay in making any effort whatsoever to desegregate. . . .

The Court concluded that "free transfer", like freedom of choice, "can have no place in a desegrated plan . . . if it cannot be shown that such a plan will further rather than delay conversion to a unitary, nonracial, nondiscriminatory school system. . . ."

In Clarksdale only two elementary schools are likely to be attended by children of both races. All other schools will be "white" and "Negro", corresponding to their status before the present plan was adopted. It is evident then that the board here has not fulfilled its duty, spelled out in *Green*, "to come forward with a plan that promises realistically to work, and promises realistically to work *now*."

The basic criteria the school board used in this case were rational: (1) maximum utilization of school buildings; (2) density of population; (3) proximity of pupils to schools; (4) natural boundaries; and (5) welfare of students. This fifth criterion requires consideration of attractive nuisances and health hazards. The presence of public transportation for school children would be relevant to the weight to be given the proximity criterion. By the same token, natural boundaries, such as the tax districts used in *Moses* v. *Washington Parish*, are not to be confused with "historical" boundaries, i.e. those that have historically separated white and Negro residential

areas.[9] Finally, safety hazards may be applicable to students of various ages in differing degrees, and the history of community action vis-a-vis those hazards should be taken into consideration.[10] No one doubts the relevance of such criteria. But a relationship otherwise rational may be insufficient in itself to meet constitutional standards—if its effect is to freeze-in past discrimination. For example, a rational relationship exists between literacy or citizenship tests (fairly administered) and the right to vote. But we enjoin the use of such tests when they freeze into a voters' registration system the effects of past discrimination.

But there is a sixth basic criterion the Board did not use: promotion of desegregation. *Jefferson, Stell, Davis, Braxton, Polk County, Carr, Bessemer, Adams, Graves* and *Greenwood*, and other cases decided by this Court,[11]

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9. The school board's original plan would have contained an irregularly drawn boundary surrounding the only all-white residential area south of the railroad tracks. This boundary would have zig-zagged and followed unpaved roads; in sum, it would have cut between the white and neighboring Negro residential areas. The district court disapproved this zone, for obvious reasons.

10. For example, while the use as a boundary of the elevated railroad tracks in Clarksdale would appear reasonable, such appearance must be measured against the past history of school children crossing those tracks to go to a school for their particular race. Having disregarded the tracks as impediments in order to maintain the racial purity of its schools, the school board cannot turn around and consider the tracks impenetrable when doing so will perpetuate that former racial purity. See United States v. Louisiana, E.D.La. 1963, 225 F. Supp. 353, aff'd 380 U.S. 145, 85 S.Ct. 817, 13 L.Ed.2d 709; United States v. Mississippi, S.D., Miss. 1964, 229 F.Supp. 925, rev'd 380 U.S. 128, 85 S.Ct. 808 13 L.Ed.2d 717.

11. Board of Duval County v. Braxton, 5 Cir. 1968, 402 F.2d 900; Stell v. Savannah-Chatham Board of Education, 5 Cir. 1967, 387 F.2d 486; U. S. v. Board of Public Instruction of Polk County, Fla., 5 Cir. 1968, 395 F.2d 66; Montgomery Board of Education v. Carr, 5 Cir. 1968, 400 F.2d 1; United States v. Bessemer Board of Education, 5 Cir. 1968, 396 F.2d 44; Adams v. Mathews, 5 Cir. 1968, ..... F.2d .....; Graves v. Walton County Board of Education, 5 Cir. 1968, ..... F.2d ...... *Jefferson, Davis,* and *Greenwood* are cited in the body of this opinion.

and now *Green* v. *County School Board of New Kent County*, require school authorities to take affirmative action that will tend to eradicate all vestiges of the dual system. For example, given a choice of alternatives, a school board should draw zone lines, locate new schools, consolidate schools, change feeder patterns, and resort to other measures that will reduce the effect of past patterns tending to maintain segregation (or token desegregation). "Where the Board is under compulsion to desegregate the schools (1st *Brown* case, 347 U.S. 483) we do not think that drawing zone lines in such a manner as to disturb the people as little as possible is a proper factor in rezoning the schools." *Northcross v. Board of Education of City of Memphis*, 6 Cir. 1964, 333 F.2d 661. In *Davis v. Board of School Commissioners of Mobile, Alabama*, 5 Cir. 1968, 393 F.2d 690 we considered it our primary concern "to see that attendance zones in the urban areas . . . [are] devised so as to create a unitary racially nondiscriminatory system." We held:

> We therefore accept the board's policy decision in this regard but insist on a survey and new effort to draw zone lines on a nonracial basis *so that the attendance-area plan will promote desegregation rather than perpetuate segregation.* It is intended that attendance areas be designed according to strictly objective criteria with the caveat that *a conscious effort should be made to move boundary lines and change feeder patterns which tend to preserve segregation.* ..... F.2d at .....

As stated by the U.S. Dept. of Health, Education, and Welfare, in its Policies on Elementary and Secondary School Compliance with Title VI of the Civil Rights Act of 1964 (March 1968):

> School systems are responsible for assuring that to the extent it is administratively feasible, the zone

boundaries do not perpetuate any vestiges of a dual school structure and that among the various attendance zone arrangements which are possible, it establishes the one which best promotes elimination of its dual school structure.

Bearing in mind the historical background of state-compelled educational segregation, consideration of race may be necessary to provide an adequate remedy that will erase or minimize the effects of the dual school system. "The Court has not merely the power but the duty to render a decree which will so far as possible, eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *United States* v. *Louisiana*, 1965, 380 U.S. 145, 154, 85 S.Ct. 817, 13 L.Ed.2d 709. A school board's zoning policy may appear to be neutral but in fact tend to retard desegregation because it binds pupils to custom-segregated neighborhoods. In this situation, the board's failure to take corrective action amounts to the State's giving official sanction to continued school segregation, contrary to the mandate of this Court and of the Supreme Court.[12] Black nationalists and white racists notwithstanding, school integration is relevant: It is an educational objective as well as a constitutional imperative.

At the time this case was tried Clarksdale still had segregated schools. A long time has elapsed since the

12. "The impact [of segregation] is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group." Brown I, 347 U.S. at 494. See Strauder v. Virginia, 1880, 100 U.S. 303, 25 L.Ed. 664. See also United States v. School District 151 of Cook County, Illinois, 7 Cir. 1968, ..... F.2d ....., in which the Seventh Circuit distinguished Bell v. Gary, 7 Cir. 1963, 324 F.2d 209, followed by Deal v. Cincinnati Board of Education, 6 Cir. 1966, 369 F.2d 55 and Downs v. Board of Education, 10 Cir. 1964, 336 F.2d 988 on the ground that they dealt with "innocently arrived at de facto segregation with 'no intention or purpose' to segregate Negro pupils from White". The dissenting opinion here cites with approval *Bell*, *Deal*, and *Downs*.

trial, partly because this Court delayed rendering its decision in order to obtain further enlightenment from the Supreme Court on the subject of attendance zones plans as against freedom of choice plans. In view of the delay, we believe that the interests of justice require that the case be remanded for a hearing to determine the effectiveness of the Clarksdale plan in today's factual setting and in the light of *Green* and other decisions of the Supreme Court and of this Court. The Board should bear in mind that it bears the burden of proving that its existing plan of desegregation is adequate *now* "to convert [the dual system] to a unitary system in which racial discrimination would be eliminated root and branch". If the plan does not promise "realistically to work now", the Board bears the burden of taking corrective action. An effective plan should produce desegregated faculties, staff, facilities, transportation, and school activities (such as athletics) along with integrated student bodies. If there are still all-Negro schools, or only a small fraction of Negroes enrolled in white schools, or no substantial integration of faculties and school activities then, as a matter of law, the existing plan fails to meet constitutional standards as established in *Green* and its companion cases. The board should consider redrawing its attendance-zone boundaries, incorporating a majority-to-minority transfer provision in its plan,[13] closing all-Negro schools, consolidating and pairing schools, rotating principals, and taking other measures to overcome the defects of the present system. As to its attendance zones,

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13. "If school officials in any district should find that their district still has segregated faculties and schools or only token integration, their affirmative duty to take corrective action requires them to try an alternative to a freedom-of-choice plan, such as a geographic-attendance plan, a combination of the two, the Princeton Plan, or some other acceptable substitute, perhaps aided by an educational park." Jefferson I, 372 F.2d at 895-896.

zone boundaries or feeder patterns designed or used to perpetuate or promote segregation shall be discontinued, and such zone lines shall be redrawn, wherever feasible, to maximize desegregation or eliminate segregation. No zone boundaries or feeder patterns which maintain what is essentially a segregated school structure shall be used. Braxton v. Board of Public Instruction of Duval County, M.D.Fla. 1967, ..... F. Supp. .....

Accordingly, we REMAND this case to the district court for entry of a judgment or further proceedings consistent with this opinion.

COX, United States District Judge, Dissenting.

This school case was argued before and presented to this Court on May 25, 1966, with the other school cases presented to and decided by the Court in what is generally known as the *Jefferson* decision.[1] This case has been voluntarily held through the intervening time by the Court without any effort to dispose of it prior to this time. On August 10, 1965, Honorable Claude F. Clayton, as trial judge,[2] issued an opinion and entered a consequent order for a permanent injunction to end all aspects of segregation of the public schools in Clarksdale, Mississippi. On December 18, 1965, another opinion was issued, and an order was entered for the final approval of school plans for the year *1965-1966*. Notice of appeal to this Court was given by the plaintiffs "from this Court's order entered December 14, 1965." The entire record with transcripts and exhibits was designated by appellants, and it is pre-

1. *United States of America and Linda Stout, Appellants, v. Jefferson County Board of Education, et al., Appellees,* (5CA) 372 F.2d 836, 380 F.2d 385, cert. denied 88 S.Ct. 72.

2. Honorable Claude F. Clayton was inducted on November 24, 1967 to the bench of the United States Court of Appeals for the Fifth Circuit.

sumed that they complain of and appeal from the opinions and orders previously stated.

The 1965-1966 school year has long since passed, and school laws have been updated and strengthened on several occasions in the interim. The people of Clarksdale have acquiesced in the mandate of the Supreme Court in its *Brown* decision and have displayed a good faith effort in this record to respect and comply with such requirements. The trial judge very carefully and very thoroughly and very skillfully assayed all of the facts and circumstances in this case in such school plan, now four years old, with full knowledge of the law and his judicial obligation in the connection. A completely voluntary advisory opinion by this Court under the circumstances would be and is unwarranted and improper. The trial judge not only knew the law, but knew facts and circumstances and drew inferences which unquestionably support his sound decision and judgment in this case. Clarksdale has a very nearly equal Negro and white population, and also has a very large Chinese population and even a large Indian population in the area. These school zones which were set up in these school plans followed natural barriers such as a railroad on an elevated right-of-way running diagonally (northeast to southwest) through and bisecting the city; another railroad dividing the southern part of the city, and Sunflower River dividing the city on the west. An effort was made by appellants to convince the Court that some of these lines were gerrymandered, but the facts clearly show in this record that city streets were used as dividing lines for the school zones, and that in many cases white people lived on both sides of the street; and that when they found themselves in a particular school zone that the children were obliged to attend schools in that zone regardless of predominance of race. The highly

experienced and well informed trial judge carefully examined these plans and approved them for the school year indicated and observed that the plaintiffs had nothing better to offer toward complete eradication of segregation from the attendance center involved.

The opinions and orders of the trial judge were carefully drafted to comply with all of the requirements of Civil Rule 52(a) as to finding of facts and conclusions of law where injunctions are involved. There is not a case cited by counsel, or to be found in the majority opinion of the Court in this case, or that has been found on independent research to support any inference or conclusion to the effect that these school zones, as contained in these school plans, with these perfectly natural boundaries and barriers should not have been accepted and approved as they were at the time by the Court. The accusations of the plaintiffs that these appellees had anything whatever to do with the acquisition by the county of some dilapidated buildings for use of the land as a public park,[3] and that these appellees had anything whatever to do with the municipality changing its boundary as having any effect upon these plans is completely without merit as the trial judge properly held. There was simply nothing that the trial judge did in this case which is not abundantly supported as to its propriety by facts and circumstances in this record.[4] It is simply not for this Court to usurp the function of the trial court in making its own findings and conclusions of the facts and circumstances in this case independently of the findings and conclusions of that able trial jurist. It

3. This park along both sides of Sunflower River as a recreation project will cost one and one-third million dollars according to recent estimate.

4. Yet Civil Rule 52(a) provides: "Finding of facts shall not be set aside *unless clearly erroneous* and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

must be remembered that the United States Court of Appeals is a creature of statute, and is vested with only statutory appellate jurisdiction as an appellate court, and not as a court of original jurisdiction as a trial court. 28 U.S.C.A. §1292.

In an injunction case, a plaintiff is entitled to such relief as may be justly due him at the time of the trial of the case, and not to a declaratory expression by this Court on a gratuitous basis, without regard to the facts and circumstances existing at the particular time, which may or not justify a trial judge as knowledgeable of the law, and certainly more familiar with the facts, to reach an entirely different conclusion. Surely the *Green* case[5] and the *Monroe* case[6] may be expected to receive careful analysis and intelligent and proper consideration and application by the trial court when called upon to consider and apply its criteria; but there is surely nothing to be found in either of those cases which can be safely said to condemn the plans which were approved in 1965 by the trial court for the 1965-1966 school year in this case. The facts as disclosed in this record simply do not support any such conclusion or inference to the contrary here.[7]

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5. *Charles C. Green v. County School Board of New Kent County, Virginia,* 391 US 430, 88 S.Ct. 1689.

6. *Brenda K. Monroe v. Board of Commissioners of Jackson, Tennessee,* 391 US 450, 88 S.Ct. 1700.

7. The trial court, with all of the facts and circumstances clearly before it, and being impregnable to any criticism under the clearly erroneous rule, found as a fact on a full evidentiary hearing that the plans of this Clarksdale school were proper, and afforded an education to each child at an attendance center as a part of a unitary system completely without regard to race and in compliance with the *Brown* cases. The Court further found that the natural barriers to these school zones constituted the lines of their boundaries; and that such boundaries were not gerrymandered, and that the school authorities had done nothing to make these boundaries to these school zones work in any particular way. These school zones were designed and grew gradually through the years by reason of economic destiny of the community with noth-

There is no evidence in this record that anybody did anything in this school district to effect the vested rights of any colored child or to affect the resulting de facto segregation. Certainly nothing has been done under any law, or by force of any public authority or power to even contribute thereto. This Court is called upon to pass judgment on a plan for these Clarksdale schools now four years old. These plans will require and doubtless receive some necessary updating. The plan in suit surely does not aid or encourage or foster or preserve any aspect of segregation of the races under any sort of compulsion. An honest application of freedom of choice as a sound American principle should certainly satisfy all vested rights of all persons.

Under the *Green* decision, it is surely the non-delegable duty of the school board and nobody else to devise a sound workable school plan in compliance with existing decisional law. No court has yet said that there must be *forced mixing* of the races in any particular ratio *contrary to the expressed wishes of students and parents of both races!* There could not be much, either constitutional or American, in such a judicial fiat. When the Court finds as the trial court here found, that the board was acting in good faith and that its plan had real prospects for dismantling the state imposed dual system at the earliest practicable date, then the plan would meet all requirements of the last announcement of the Supreme Court on this subject.

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ing else in view. The trial judge thus approved these zones where disparities in population as to race naturally grew and existed, and were accepted as de facto segregation. The facts and circumstances in the *Green* and *Monroe* decisions do not condemn or even disapprove such conclusion under the facts here. The *Green* and *Monroe* principles may not be distorted to say that a given percent or ratio of children as to race must exist as a mathematical equation under all circumstances to meet the requirements of law.

The principle of bona fide de facto segregation has been approved in four Circuits and the Supreme Court has never said aught to the contrary. In *Rachel Lynn Bell v. School City of Gary, Indiana,* (7CA) 324 F.2d 209, cert. denied 377 US 924, it is said: "Plaintiffs are unable to point to any court decision which has laid down the principle which justifies their claim that there is an affirmative duty on the Gary school system to recast or realign school districts or areas for the purpose of mixing or blending Negroes and whites in a particular school." In *Renee Patrice Gilliam v. School Board of City of Hopewell, Virginia,* (4CA) 345 F.2d 325 the Court held: "The constitution does not require the abandonment of neighborhood schools and the transportation of pupils from the area to another solely for the purpose of mixing the races in the schools." That principle was followed in *Deal v. Cincinnati Board of Education,* (6CA) 369 F.2d 55, cert. denied 389 US 847; and in *Downs v. Board of Education,* (10CA) 336 F.2d 988, cert. denied 380 US 814. The same result was reached in *Renee Patrice Gilliam v. School Board of City of Hopewell, Virginia,* supra, where the opinion of the trial court was vacated without opinion on such question in 382 US 103, 86 S.Ct. 224, because of a lack of an evidentiary hearing in the trial court. The case at bar was accorded a full evidentiary hearing by an experienced trial judge far more competent than any member of this panel to weigh and judge the problem from the cold pages of this record.

The principle of freedom of choice was heralded in the *Jefferson* decisions which were companion cases to this case and were argued and presented to this Court at the same time. There is nothing wrong with that principle as a means of uprooting every vestige of state enforced segregation. The trouble with the plan not working in

most instances is occasioned by an insincere, less than halfhearted, effort on the part of some school authorities to see that such plan really worked. No devious devices should be allowed to be engrafted upon such a plan to keep it from being an honest expression of the free will and choice of the parent and child as to the school to be attended.[8] If these school plans in Clarksdale afforded a child a freedom of choice as to the desired attendance center (as does the *Jefferson* plan), such a plan would seem impervious to any just criticism. It is incumbent upon the board, as experienced school people, to devise a plan which will "*work*" within valid constitutional limits. It should not be necessary for the public to have any school closed, or any new school built just to accommodate a workable plan, but the board should have the power and authority to permit transfers from one zone to another within limits of existing facilities and without discrimination as to race. These observations, in response to suggested changes in the plan contained in the majority opinion, are doubtless vulnerable to the same criticism as being dicta, if not obiter dicta.

The suggestion of the majority that the board consider "incorporating a majority-to-minority transfer provision in its plan" is with deference a distortion of the

8. Significantly, as a declaration of Congressional policy in "Departments of Labor, and Health, Education and Welfare Appropriations Act 1969" (P.L. 90-557; 82 Stat. 969; Title IV - General Provisions), it is said: "Sec. 409. No part of the funds contained in this Act may be used to force busing of students, abolishment of any school, or to force any student attending any elementary or secondary school to attend a particular school against the choice of his or her parents or parent in order to overcome racial imbalance. Sec. 410. No part of the funds contained in this Act shall be used to force busing of students, the abolishment of any school or the attendance of students at a particular school in order to overcome racial imbalance as a condition precedent to obtaining Federal funds otherwise available to any State, school district, or school."

furtherest reaches of *Brown* and is completely untenable as a sound principle of constitutional law.[9] The principles announced in *Green* are: "That it is incumbent upon the school board to establish that its proposed plan promises meaningful and immediate progress toward disestablishing *state imposed* segregation;" that "where the Court finds the board to be acting in good faith and the proposed plan to have real prospects for dismantling the state imposed dual system at the earliest practicable date, then the plan may be said to provide effective relief." These principles are simply not consonant with the newly devised principles found for the first time in the majority opinion here.

The majority do not reverse or vacate the opinion and order of the trial court, but remand the case to the trial court and in such respects I concur. But insofar as the trial court is directed to enter a judgment consistent with and in conformity to the majority opinion, I very respectfully dissent: First, because the majority opinion in this state of record is mere dicta, if not obiter dicta; second, because the majority opinion assumes that the law requires *forced mixing* in these Clarksdale schools in some undesignated ratio as to race to satisfy present requirements as to desegregation of these schools as a matter of decisional law.

Obviously, the delay of the majority in awaiting an announcement of any such principles from the Supreme Court of the United States to support their majority opin-

9. An unchanged Fourteenth Amendment to the United States Constitution was not violated said the Chief Justice of the United States speaking for every member of the Court in 1927 where it was complained that the state had a policy based on organic law and statutes which excluded a colored child from attendance at a white school. *Gong Lum v. Rice,* 48 S.Ct. 91, 275 US 78. In *Brown,* the Court decided the case as one of first impression.

ion was not fruitful or rewarding. *Green* said that in 1968 a plan had to promise meaningful and immediate progress toward disestablishing state imposed segregation. Judge Clayton thought and found as a fact in 1965 that this plan did exactly that to his entire satisfaction and the plaintiffs then had nothing better to offer as he said after hearing all of the testimony and receiving all of the evidence in the case, and such finding may not be arbitrarily and capriciously brushed aside as clearly erroneous when it is so abundantly supported, as it is, by the proof in this record. I would affirm and remand.

/s/ Harold Cox
United States
District Judge

# United States Court of Appeals

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1965

No. 23255

D. C. Docket No. CA-DC-6428

REBECCA E. HENRY, ET AL.,
Appellants,

VERSUS

THE CLARKSDALE MUNICIPAL SEPARATE SCHOOL DISTRICT, ET AL.,
Appellees.

*Appeal from the United States District Court for the Northern District of Mississippi.*

Before WISDOM and THORNBERRY, Circuit Judges, and COX,* District Judge.

## JUDGMENT

(Filed June 30, 1969)

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Mississippi, and was argued by counsel;

*William Harold Cox, United States District Judge for the Southern District of Mississippi, sitting by designation.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, remanded to the said District Court for entry of a judgment or further proceedings consistent with the opinion of this Court.

Costs of the appeal shall be taxed against the appellees.

Cox, District Judge, dissenting.

March 6, 1969

Issued as Mandate: June 26, 1969.

IN THE

# United States Court of Appeals

FOR THE FIFTH CIRCUIT

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No. 23255

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REBECCA E. HENRY, ET AL.,
Appellants,

VERSUS

THE CLARKSDALE MUNICIPAL SEPARATE SCHOOL DISTRICT, ET AL.,
Appellees.

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*Appeal from the United States District Court for the Northern District of Mississippi.*

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**ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC**

(June 26, 1969)

Before WISDOM and THORNBERRY, Circuit Judges, and COX,* District Judge.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

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*William Harold Cox, United States District Judge for the Southern District of Mississippi, sitting by designation.

(Caption Omitted)

## ORDER OF THE DISTRICT COURT DATED JUNE 26, 1964

### Order for Preliminary Injunction

This case is before the court on plaintiffs' motion for a temporary injunction to require defendants to submit a plan for the desegregation of the public schools of the Clarksdale Municipal Separate School District, memorandum briefs of the parties and other materials furnished by the parties. It is conceded, and the court agrees, that it is the court's duty, especially under cases heretofore decided by the Supreme Court, by the Court of Appeals for the Fifth Circuit and by other cases decided by other courts, some of which are listed following this order, to sustain said motion and issue an injunction for the aforementioned purposes. However, there are certain facts which must guide the court in shaping its preliminary order in this case at this time. They are:

1. The Clarksdale Municipal Separate School District, acting by and through its Board of Trustees as authorized by the laws of the State of Mississippi, before this suit was filed contracted with some of the other defendants (see Chapter 301, General Laws of Mississippi 1960, appearing as Sections 6328-71, 72, 73, 74, 75, 76 and 76.5, Mississippi Code 1942 Recompiled) and this contract will expire, unless renewed with the end of the school year 1964-1965. That, as it seems, these statutes and this contract caused some confusion on the part of plaintiffs and caused said other defendants to be joined in this case. Apparently no school with which this suit is concerned is under the present jurisdiction of any of said other defendants, but only the Board of Trustees of said Clarksdale

Municipal Separate School District has the sole and exclusive power to designate which of the children in said separate school district will attend the schools with which this case is presently concerned. No relief, at this time, against any defendant, other than the Clarksdale Municipal School District and its Board of Trustees, would be proper. It would be improvident, however, to eliminate said other defendants at this time and they should be retained as defendants pending full development on the merits and further order of the court.

2. The schools operated by the Clarksdale Municipal Separate School District are and have been operated on a racially segregated basis with white children only attending schools operated for them and only Negro children attending schools operated for them. This has been the situation for many years. There is no dispute in this regard. The parties concede that this is true. And, it is also true that this suit is the first formal court undertaking that has ever sought to make any change at all with such segregated practices in this school system. This suit was filed April 22, 1964.

3. Negro children of public school age are in the overwhelming majority as compared to white children in the same category in said separate school district.

4. All the schools now and heretofore available to and attended by Negro children in said school district, on recognized standards, are rated AA, while some of the schools now and heretofore available to and attended by white children of this district are rated A, which is a lower classification than AA.

5. No protest with respect to the assignment of any Negro child to any school has ever been made to the Superintendent of Schools for said district or his representa-

tives either by a child or a child's parents, although all pupil assignments to schools are first made on a temporary basis with the right of protest, or to request a change.

6. Only a small part of the facts and circumstances which will be pertinent to ultimate disposition of this case are now known to the court from the files and records or otherwise, and, all such facts and circumstances cannot be fully known until a full hearing on the merits.

7. In cases such as this, different decrees, different plans, different systems have been used from court to court, from district to district, from school to school, with each designed to fit the facts and circumstances of each particular situation on a fair and an equitable basis. And, it may be that the plan which will be initially approved or prescribed by this court will not be exactly like any plan used by any other court or in any other school, since the plan here must be fashioned to fit the problems as they exist in the Clarksdale Municipal Separate School District.

8. This court has the utmost confidence in the present members of the Board of Trustees of the Clarksdale Municipal School District and their counsel. It fully believes that they will promptly, and in good faith, undertake to fully comply with this court's orders in this case.

9. This court also has great faith in the people of this school district, both white and Negro. It believes and expects that the leadership of both races will approach solution of the many problems inherent in this developing situation with calmness and in friendship, good will and understanding.

Having in mind all of the foregoing, and as to the defendants, Clarksdale Municipal Separate School District

and the members of the Board of Trustees of said school district, their agents, servants and employees, and the successors in office of said trustees, those acting in concert with them or with any of them who shall receive notice of this order, it is.

ORDERED:

1. That they (the aforementioned) shall be and are hereby temporarily restrained and enjoined, in assigning pupils to the public schools now and hereafter operated by or under the supervision of said school district, from making any or all of such assignments solely because of the race of any or all of such pupils from and after such time as may be reasonably necessary to plan for and make arrangements for assignment of pupils and admission of pupils to such schools on a racially nondiscriminatory basis.

2. They, said defendants, shall be and are hereby required to fully prepare a plan by which an immediate start will be made in the desegregation of such schools, with such plan to provide that desegregation is to progress with all deliberate speed until all grades in all schools shall be included in said plan, and to provide that a minimum of one grade in all schools shall come under said plan at the beginning of the school term in September 1964. Said plan shall be submitted to this court for its consideration no later than July 30, 1964. A copy of said plan will be served on counsel for plaintiffs not later than five days before said date.

3. Said defendants may submit to the court simultaneously with, or promptly after, disapproval of the plan above required (if it is not approved) one or more alternate plans and may designate the order of preference assigned by them to such plan or plans.

4. A hearing will be held following submission of the plan (or plans) aforementioned at a time and place to be fixed by the court.

It is further ordered that no relief at this time is granted against the other defendants but they are retained in the case pending a full hearing on the merits or until further order of this court.

This the 26th day of June, 1964.

CLAUDE F. CLAYTON,
*District Judge*

# MEMORANDUM OPINION OF DISTRICT COURT DATED AUGUST 10, 1965

IN
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION
No. DC6428

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REBECCA E. HENRY, *et al.*,

*Plaintiffs,*

—v.—

THE CLARKSDALE MUNICIPAL SEPARATE SCHOOL DISTRICT, *et al.*,

*Defendants.*

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This is a school desegregation suit which was filed in April 1964 by Negro residents of Clarksdale, Mississippi, seeking injunctive relief to end segregation by race in the schools of the Clarksdale Municipal Separate School District. On June 26, 1964, this court ordered the Board of Trustees of this school system to submit a plan which would provide, as a minimum, for the desegregation of one grade in September 1964. Defendants were given the right to submit alternative plans. Within the time required, defendants filed plans in the alternative providing a selection of four different modified stair-step time schedules for desegregation.[1] Each of these plans was bottomed on

1. Commendably, Plan IV provided for complete desegregation of all grades within a total of five years, a faster rate than the six year over-all period allowed defendants by the Court of Appeals of this circuit in *Armstrong* v. *Board of Education*, 333 F. 2d 47; *Davis* v. *Board of School Commissioners*, 333 F. 2d 55 and *Stell* v. *Savannah-Chatham County Board*, 333 F. 2d 55, decided June 18, 1964.

the establishment of neighborhood school zones with pupils living in a zone to be required without exception to attend the school for that zone when the plan had progressed to the point where the grade for that child was included therein. Until that time arrived, each pupil was to continue attendance at the school to which the pupil was already assigned. Pupils newly come to the system would be assigned in the same way—zone of residence and school for the zone. Assertedly, the zones as proposed are based on (1) utilization of school buildings (2) proximity of pupils to schools to be attended (3) natural boundaries and (4) the welfare of all pupils.

Plaintiffs promptly objected to the plan as lacking in specificity, speed and completeness. A hearing was held on August 19, 1964, on defendant's proposals and plaintiffs' objections thereto, as a result of which the court ordered into effect portions of defendants' Plans I and II to require the desegregation of grade one in September 1964 and grade two in January 1965. This was a tentative, interim procedure made necessary by the late filing of the complaint, the time necessary to formulate plans[2] and the imminence of the opening date for these schools in the fall of 1964.

On January 5, 1965, alleging that no desegregation had resulted from the plan as ordered into effect and that because of the nature of the plan, no desegregation is likely to result in the future, plaintiffs filed a motion for further injunctive relief. Following this a full hearing was had and the case is for disposition on briefs.

All of the schools of the Clarksdale Municipal Separate School District were operated on a completely segre-

2. During the short time available for planning under the first order, many of the professional staff of these schools were not available to participate therein since the 1963-1964 school session had ended with the usual summer scatteration of teachers.

gated basis before the filing of this suit. Pupils and staffs were assigned to schools on a racial basis. Thus each school was either all Negro or all white. The physical plant now consists of two high schools[3] (each with a junior high school in connection therewith or operated from the same buildings) and eight elementary schools.[4]

The controversy between plaintiffs and defendants with respect to the proposals made by defendants is focused on two principal areas, (1) the rate at which desegregation will progress, and (2) the suitability or validity of the attendance zones as contemplated. There are other issues which will be mentioned later.

## I.

## The Rate at Which Desegregation Must Progress

Following the latest teachings of the Court of Appeals for this circuit now available to this court as they appear in *Singleton* v. *Jackson Municipal Separate School District*, ..... F. 2d ..... (5th Cir. June 22, 1965), and giving careful consideration to the fact that the defendants have the first responsibility in this area, it appears reasonable and proper that desegregation of the Clarksdale schools,

3. When this suit was filed, the Board of Trustees of the Clarksdale Municipal Separate School District shared jurisdiction with the Coahoma County School Board over a high school, owned by the county, and the physical plant of the Clarksdale high school-junior high school facilities. This was under a contract providing that *white* senior high school students from both the city and county would attend the school owned by the county and *white* junior high school pupils from the city and county would attend school at the facilities owned by Clarksdale. This agreement has expired and has not been renewed.

4. One of the elementary school buildings was under contract and in the process of being constructed at the time of the hearing of August 19, 1964. It was estimated to be ready for occupancy at the beginning of the second half of that school year (1964-1965). This was one of the factors considered in directing that Plan I go into effect in September and Plan II in January 1965.

in addition to grades one and two heretofore ordered desegregated, must progress in accordance with the schedule following:

| *School Year in Which Desegregation Is to Occur* | *Grades to be Desegregated* |
|---|---|
| 1965-1966 | Third, Fourth and Twelfth |
| 1966-1967 | *Fifth, Sixth, Tenth* and Eleventh |
| 1967-1968 | Seventh, Eighth and Ninth |

In Singleton, the Court of Appeals cited the *General Statement of Policies Under Title VI of the Civil Rights Act of 1964 Respecting Desegregation of Elementary and Secondary School,* United States Office of Education, Department of Health, Education, and Welfare, April 1965, and, inter alia, said:

> We attach great weight to the standards established by the Office of Education. The judiciary has of course functions and duties distinct from those of the executive department, but in carrying out a national policy we have the same objective. There should be a close correlation, therefore, between the judiciary's standards in enforcing the national policy requiring desegregation of public schools and the executive department's standards in administering this policy. Absent legal questions, the United States Office of Education is better qualified than the courts and is the more appropriate federal body to weigh administrative difficulties inherent in school desegregation plans. If in some district courts judicial guides for approval of a school desegregation plan are more acceptable to the community or substantially less burdensome than H.E.W. guides, school

> boards may turn to the federal courts as a means of circumventing the H.E.W. requirements for financial aid. Instead of a uniform policy relatively easy to administer, both the courts and the Office of Education would have to struggle with individual school systems on ad hoc basis. If judicial standards are lower, recalcitrant school boards in effect will receive a premium for recalcitrance; the more the intransigence, the bigger the bonus.

The aforementioned progressive schedule for desegregation seems to meet the requirements of *Singleton* and defendants will be required to proceed in accordance therewith. See also *Price, et al.* v. *The Denison Independent School District Board of Education, et al.*, ..... F.2d ..... (5th Cir. July 2, 1965, No. 21632).

## II.

### Proposed Attendance Zones

In reality defendants had but two choices when they were required to prepare and submit plans for the desegregation of the Clarksdale public school system—the "freedom of choice" system of pupil assignment, or the "neighborhood" plan. They chose the latter, which they had the constitutional right to do. Plaintiffs do not object to the basic choice of methods (in fact, they recommend it) but, they vigorously attack the zone boundaries as proposed, saying in substance that they do not comport with standards and practices generally recognized in professional education circles,[5] and that by design they are calculated to perpetuate a segregated school system and thus to defeat desegregation.

5. Two experts testified for plaintiffs and were critical of the plans of defendants as to zone boundaries in some particulars. However, they were not in agreement as to what should be done. Their testimony will be dealt with later in this opinion.

The cases which have approved "neighborhood" or attendance zone plans for assignment of pupils to schools within a public school system are legion.[6] Lengthy quotations from them are not required and would unduly lengthen this opinion. In sum, these cases teach that attendance zones are constitutionally permissible if (1) all pupils living in each zone are required to attend the school in that zone, and (2) the boundaries of each zone are fairly determined on a color blind or non-racial basis. Under defendants' proposals, all pupils in each zone will be required to attend the school for that zone.[7] Thus, attention need be given here primarily to the justification advanced by defendants for the zone boundaries as proposed and the points in opposition thereto as advanced by plaintiffs.

Careful consideration must and has been given to the physical facts as they exist in Clarksdale as they bear on the troublesome problems incident to the establishment of public school attendance zones.

Clarksdale is situated on the flat Mississippi Delta. It has a population in excess of 20,000 and is cut almost in half by a railroad which runs through the community in a

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6. Some of these cases are: *Bell* v. *School City of Gary, Indiana*, 213 F. Supp. 819 (N.D. Ind. 1963), aff'd 324 F. 2d 209 (7th Cir. 1963), *cert. den.*, 377 U. S. 924 (1964); *Northcross* v. *Board of Education of City of Memphis*, 302 F. 2d 818 (6th Cir. 1962), *cert. den.*, 370 U.S. 944 (1962); *Gilliam* v. *City of Hopewell, Va.*, ..... F. 2d ..... (4th Cir. April 7, 1965); *Downs* v. *Board of Education of Kansas City*, 336 F. 2d 988 (10th Cir. 1964); *Holland* v. *Board of Public Instruction*, 258 F. 2d 730 (5th Cir. 1958); *Blakeney* v. *Fairfax County School Board*, 231 F. Supp. 1006 (E.D. Va. 1964); *Lynch* v. *Kenston School District Board of Education*, 229 F. Supp. 740 (N. D. Ohio 1964); *Bush* v. *Orleans Parish School Board*, 230 F. Supp. 509 (E.D. La. 1963); *Monroe* v. *Board of Commissioners of City of Jackson, Tennessee*, 221 F. Supp. 968 (W. D. Tenn. 1963); *Webb* v. *Board of Education of City of Chicago*, 223 F. Supp. 466 (N.D. Ill. 1963); *Evans* v. *Buchanan*, 207 F. Supp. 820 (D. Del. 1962); *Henry* v. *Godsell*, 165 F. Supp. 87 (E.D. Mich. 1958); *Brown* v. *Board of Education of Topeka*, 139 F. Supp. 468 (D. Kan. 1955).

7. Attendance will now, of course, begin in accordance with the desegregation schedule heretofore listed in this opinion.

northeasterly-southwesterly direction. This railroad is built on an earth fill which elevates the tracks an appreciable height above the grade of the surrounding lands. Throughout a substantial portion of the length of this railroad through this community, the area immediately adjacent thereto on both sides is occupied by commercial and industrial establishments. From municipal boundary to municipal boundary along these tracks is approximately 3½ miles.

The northerly half of Clarksdale is bisected by the Sunflower River. The southerly half is divided by another line of railroad which is built on approximately the same grade as the surrounding lands. It runs north and south.

Vehicular and pedestrian traffic moving across the railroad which is on the embankment is required to use one of four underpasses or the one crossing which is at the same grade as the railroad track. Only one of these underpasses is west of the Sunflower River and it is right against the river. To move from a residential area on one side of this railroad to a residential area, or to any one of the several school sites on the other side requires, in most instances, that the movement be made through either a commercial area, an industrial area, or both.

The central business district of Clarksdale is in the northerly half and east of the Sunflower River. There are two bridges over the river in both the northerly and southerly sections of the community.

*High School and Junior High School Zones*

As aforementioned, there are two combination high school-junior high school plants in this system. One of these is in the northerly half of Clarksdale, while the other is in the southerly half. Defendants propose that the railroad tracks, at a height above ground as afore-

mentioned, which run in a northeasterly-southwesterly direction shall be the boundary line for high school and junior high school pupil assignment purposes, between the northerly and southerly parts of the city. They contend that this is a natural boundary and that to use it for these purposes will be for the welfare of all the pupils of junior high school and high school ages and that it will eliminate pupil movement across the railroad tracks through commercial and industrial areas, and thus minimize dangers incident to traffic.

Geographically it is without question that the school plant north of the railroad tracks is reasonably well situated with respect to the residential areas in the northerly section of the school district.

The school plant south of the railroad tracks is not as well located with respect to the residential areas in the southerly part of the district, but no other boundary line for high school-junior high school purposes which can be envisioned would afford a more efficient utilization of this school plant and the plant north of the railroad tracks from the standpoint of nearness of pupils to both schools.

Plaintiffs complain that nearly all Negro pupils who are now of junior high school and high school ages and who will reach such ages in the future live in the southerly part of Clarksdale and would therefore be required to attend the school south of the railroad, which is the one formerly operated as a Negro school, and, that thus such a zone will result in the continuation of a segregated school at this site. This argument, however, overlooks the fact that there are also a substantial number of white pupils who live in this zone who will be required to attend the school south of the railroad at junior high school and high school levels, if they wish to avail themselves of the facilities of this public school system.

Complaint is also made that practically no school age Negroes live in the northerly zone and that thus the junior high school-high school facility in this zone, which was and is all white, will continue to be all white. It is possible that the use of this railroad as the dividing line between these zones may result in this school remaining, from the pupil standpoint, all white. But, some Negro families have lived in the northerly zone. Perhaps some Negroes live there now. It must also be noted that there are no laws or ordinances to prevent Negroes living in this zone—in fact there could not be.

The facts which give rise to these two of plaintiffs' complaints arise from racial housing patterns which have developed over the years. They were not caused by the proposal to use this railroad as the boundary between these zones and they do not cause this railroad to be any less a proper boundary when all factors are considered.

It appears to this court without question that the use of this raised railroad track as a zone boundary for junior high school and high school purposes is reasonable. It is a natural boundary. Its use will permit efficient utilization of both these school plants, will place a great majority of pupils in both zones closer to their school than would be the case if any other boundary proposed or considered were used and will eliminate for *all* pupils attending both schools the risks inherent in movement through busy commercial and industrial areas.

## III.

### Proposed Elementary Zones

Of the eight[8] elementary schools now operated by this school system, three are located north of the railroad on the fill and five are to its south.

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8. One of these was completed in time for use beginning in January 1965 (see footnote 4, *supra*).

Defendants' approach to the establishment of attendance zones for elementary schools was to divide the school district into four sub-districts, with three of the sub-districts being divided into attendance zones and the fourth to be itself an attendance zone.

Two of these proposed sub-districts are in the aforementioned northerly part of the school district and two are in the area to the south of the elevated railroad.

Defendants propose to use the Sunflower River as the boundary between the two sub-districts north and to use the north-south railroad (unelevated) as the boundary between the two sub-districts south.

These sub-districts may be utilitarian from the standpoint of school administration, but, frankly, with respect to the problems here presented by this case, sub-districts, as such, *seem to have little significance.* They do not appear to bear with any appreciable force with respect to the problems this court has in considering the proposed boundary lines for attendance zones, since the court must look at each attendance zone as it is proposed to be established for each school. With these thoughts in mind and with the disposition this court is making with respect to attendance zones, it is sufficient now to say that the sub-district boundary lines as proposed, both north and south are natural boundary lines easily defined and easy to be seen. Plaintiffs have made no objection to these proposed sub-district boundary lines directly. Hence, they will be approved.

However, in the light of this court's action with respect to proposed elementary school attendance zones south of the elevated railroad, defendants, if they care to do so, may revise the sub-district boundaries for that territory, but subject to approval by the court.

*Attendance Zones—North*

The attendance zones proposed for the existing Heidelberg, Kirkpatrick and Oakhurst Schools and for the school being constructed for the fourth proposed zone north of the elevated railroad[9] all seem to be reasonably well designed for efficient use of these school facilities, taking into account the proximity of residential areas within each zone[10] to the school plant therein (or to be therein), the pupil capacity of these facilities, and the safety and welfare of the pupils residing therein. Even the educational experts who testified for plaintiffs could find little real fault with the plans for these zones. There was some criticism of some of these zones by these witnesses, but this was so only as these zones were related by them to the area south of the elevated railroad. In the light of this court's views heretofore expressed with respect to the suitability of this railroad as a zone boundary for high school-junior high school purposes, such criticism has little weight.[11] These are good plans for these four zones. They should and will be approved.

*Attendance Zones—South*

The territory south of the railroad which is on the earth fill is divided into two "sub-districts" (E-1 and E-2). The boundary between these two sub-districts, as aforementioned, is the north-south railroad which is not on a fill. E-1 is east of the north-south railroad and E-2 is to the west. In the eastern sub-district (E-1), three schools are located, Oliver (E-1-A), Hall (E-1-B) and Clark (E-

9. This proposed zone is also a "sub-district".

10. Probable increases in some of the residential areas by reason of new residential developments also have been considered.

11. It would be even more undesirable for children of elementary school ages to cross this railroad and the territory adjacent thereto than it would be for children in the higher grades to do so.

1-C). Two schools are in the western sub-district (E-2); Washington (E-2-A) and Riverton (E-2-B).

The eastern sub-district territory approximates a rough triangle with the northern and western sides formed by the two railroads and the eastern by the school district boundary which zigzags somewhat like stair-steps. The Oliver School is in the southeastern part of this territory, while Clark and Hall are in the north-western section. Hall is somewhat further to the north than Clark and is east of Clark, although these two school buildings are quite close together.

In the western sub-district (E-2), Washington School is located in the southeastern section, while Riverton is located in the west central section.[12]

From what has been said and from a careful examination of the maps in evidence, it is apparent that a number of these school facilities are poorly located when considered in the light of present needs and in the light of the many problems now presented incident to desegregation of a school system whose physical plant was largely developed over a period of many years when all schools in the system were operated on a completely segregated basis. Moreover, it goes without saying that the wisdom of hindsight with respect to where schools should have been built has no value now. The "Monday morning quarterback" can contribute nothing here. The realities of the locations of these schools must be accepted and attendance zones devised which will best meet the needs of

12. Riverton School is a newly constructed facility which was first used beginning with the second semester of the school year 1964-1965. (See footnote 4, *supra*.) It is situated at the north-western edge of the built up residential areas in this part of the school district. It is said that this site was selected for two principal reasons—the high cost of land at a more suitable location and prospective future residential development and growth.

this school system and of all of the pupils who are entitled to attend school in the facilities operated by this school district. The attendance zones proposed by defendants must be evaluated objectively to determine whether they will afford efficient use of the existing school plant, if they have taken into account proximity of prospective pupils to the school to which these zones would require they be assigned, to ascertain if the safety and welfare of the pupils will be reasonably well served and to resolve what is a most important issue in this case—whether these zones have been proposed on a completely racially non-discriminatory basis.

As has been pointed out, sub-districts, as such, have little value here. This court must look to the proposed attendance zones.

*Riverton (E-2-B)*

This attendance zone as proposed has as its northerly boundary the elevated railroad, its southerly boundary the boundary of the school district and its easterly boundary the Sunflower River north to Fifth Street.[13] Then the boundary runs east along Fifth Street to the north-south railroad and then along this railroad to the elevated railroad. The school building is in the approximate geographical center of the proposed zone, but at the western edge of the built up area.

This new building[14] operated at near capacity during the last semester of the 1964-1965 school year.[15]

13. There is a modern bridge across the river on Fourth Street, the midline of this area.

14. This building has 12 rooms with a maximum rated pupil capacity, according to the rating system commonly used by accrediting (rating) agencies in Mississippi, of 420. All 12 rooms were in use during the school year 1964-1965.

15. One of plaintiffs' experts believed it to be crowded. The superintendent of these schools said this witness had misinterpreted data and that the school was not crowded.

Accepting, as this court has done, that the elevated railroad is a valid, suitable zone boundary, criticism of this proposed zone by plaintiffs' experts was minimal.[16]

Taking the physical facts as they are (location and capacity of school building, residential areas in the zone, routes of travel) and applying the mentioned criteria these proposed boundaries seem to establish a valid attendance zone,[17] with the possible exception of the territory east of the Sunflower River and north of Fifth Street. The center of the residential area within that rectangle seems about as near to the Washington School (E-2-A)[18] as to the Riverton School, and much nearer to Clark School (E-1-C).[19]

*Oliver (E-1-A)*

This proposed attendance zone has as its easterly and southern boundaries the boundary lines of the school district.[20] From the western end of the south boundary the line runs due north and then northwesterly along Florida

16. One of them would have had some pupils from somewhere in this district cross the railroad and attend school at Oakhurst which he claimed had space available. But, apparently he misinterpreted data and did not appreciate fully the situation with respect to the Oakhurst zone

17. It is crossed by United States Highway No. 61, but apparently all residential areas now in existence are on the same side of the highway as the school building.

18. If this section is added to the Washington School zone (E-2-A), the pupils living there would not have to cross the river and would travel about the same distance. They would have to cross United States Highway No. 61.

19. If this area is made a part of the Clark School zone (E-1-C) the pupils would be much closer but would cross the north-south railroad to go to school. Since it is not elevated, and apparently has reasonably safe street crossings and since adjoining territory at this section is not heavily commercialized or industrialized, it is not as great a barrier or hazard as the elevated railroad.

20. The southern boundary extends into the district for about 150 feet along the south line of Wissler Street.

Street to the elevated railroad which forms the northerly boundary. The school building[21] is in the southeastern portion of this territory. Florida Street is prominent and improved. Thus all proposed boundaries are clearly defined and easy to identify. But, there are several apparently bad features with respect to this proposed zone.

The school building is not at all well located with reference to all of the territory. Pupils in the extreme northwestern area are approximately 800 to 800 yards from the school and only 100 to 200 yards from Hall School (E-1-B). Pupils living in the extreme northeasterly area are more than 1000 yards from the school, but they would be about 700 yards from Hall School. United States Highway No. 61 runs through this territory in a southwesterly-northeasterly direction. About one-third of the territory is south and the rest north of this highway. The highway is an obstacle and a hazard to pupil traffic across it. It might be feasible to use this highway as the northerly boundary of the zone for Oliver School and extend the zone westward along this highway to United States Highway No. 49 (which runs in a northwesterly-southeasterly direction) and to the south along that highway to the school district boundary.

*Hall (E-1-B)*

The zone proposed for this school has as its northerly boundary the elevated railroad, for its easterly boundary Florida Street from this railroad to Wissler Street then the school district boundary. For its southerly boundary it has the district line. For its westerly boundary it has

21. There are 19 rooms in this plant but 4 of them are allocated to Higgins (high school-junior high school). Of the 15 available for elementary school purposes, only 14 are used. These 14 rooms have a maximum rated capacity of 490. (See footnote 14, *supra.*) The 15 rooms would have a maximum rated capacity of 525. Nineteen rooms would have a maximum rated capacity of 665.

the unelevated railroad from the southerly boundary to United States Highway No. 61, the highway to Mississippi Street, that street to Seventh Street. It then runs a short distance in an easterly direction along that street, then northeasterly along a subdivision boundary (which is not even a street or an alley) which would be difficult for a layman to identify on the ground, to Wilson Avenue and then along this avenue to the elevated railroad. The school plant is located in the extreme north central area of this elongated zone. It is adjacent to the elevated railroad.[22]

The evidence shows that the section of Wilson Avenue which forms a part of this boundary is improved for only a short distance, the rest is unimproved and some consists only of "tracks in the grass." Further, the evidence strongly indicates, if it does not conclusively show, that to the west of Wilson Avenue and the subdivision boundary the population is white and to the east the population is Negro.

It is fully recognized that the proximity of this school—Hall—to Clark School presents a built in problem for defendants. These buildings probably were well located when built years ago, for the operation of a racially segregated school system. No reasonable person would contend that they are well located for a desegregated system.

From the map it appears that more than fifty blocks of what appears to be residential area is included in this proposed zone, with the rather tortured and indistinct section of boundary aforementioned, while it thus also

22. This plant consists of three units. One unit of 4 rooms is not in use. In the two units in use there are 16 rooms, but only 14 are in use. These 14 have a maximum rated pupil capacity of 490. The 16 rooms would have a maximum rated capacity of 560. All 20 rooms would have a maximum rated capacity of 700.

appears that less than half that number of blocks of apparent residential area are included in the compact regular shaped zone proposed for Clark School.[23] Consideration must also be given to the fact that children living in many sections of this proposed zone would be closer to other schools, notably Clark School for some in the north-western area[24] and Washington or Oliver Schools for all in the southern area.[25]

It must also be noted that this proposed zone is bisected by the aforementioned United States Highway No. 61.[26]

It seems probable that an attendance zone for this school could be devised on a more efficient basis.

*Washington (E-2-A)*

The territory proposed for the attendance zone for this school is—in crude form—shaped like a boot. Its southerly boundary is the school district line which forms the heel and sole of the boot. Its westerly boundary, the Sunflower River, forms the toe, foot and upper front of the boot. Fifth Street from the river easterly to the unelevated railroad forms the top of the boot and is the northerly boundary. From Fifth Street southeasterly to the heel of the boot the unelevated railroad forms the boundary. All of these boundaries are clear and easily identifiable.

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23. It must also be noted here that a substantial number of pupils who reside in proposed zone E-3-A will attend Clark School until the new building for that zone is completed and ready for use.

24. Some of these would be within about one block of Clark as compared to about six to Hall.

25. To attend Washington for those in this area would require that they cross the unelevated railroad. (See footnote 17, *supra.*)

26. See discussion of Oliver (E-1-A), *supra.*

The school plant is just north of the arch of the boot.[27] It is not well located for most of the area in this zone. There appear to be about twelve to fourteen blocks of residential area extending to the north of the school. Just to the north of this area there seems to be an industrial area entirely across the zone, averaging approximately 900 yards north and south. To the north of this industrial area, in the upper one-half of the boot leg or top, there appear to be between fifteen to twenty blocks of residential area. Approximately four to five of these blocks are south of United States Highway No. 61, with the others being to the north. This highway cuts across this zone in a northeasterly-southwesterly direction. As has been mentioned, this highway is an obstacle and a hazard to pupil traffic across it.

Most of the northerly residential area in this zone is as close to other schools (Riverton and Clark) as to Washington. Much of it is closer to Clark.

It may well be that to use this school—Washington—to its capacity will require that this proposed attendance zone be used for it. However, if changes are made in the zones proposed for other schools south of the elevated railroad, consideration probably should be given to a redesign of the zone for this school. One apparent possibility would be to add to this zone the territory bounded by United States Highway No. 49, the unelevated railroad, United States Highway No. 61 and the school boundary, deleting the area within the zone as now proposed north of United States Highway No. 61. This, of course, may not be feasible because of pupil population within these areas and the places of residence of these children.

27. There are 16 rooms available in this plant, but only 15 are in use. The 15 rooms have a maximum rated pupil capacity of 525. All 16 rooms would have a maximum rated capacity of 560. (See footnote 14, *supra*.)

*Clark (E-1-C)*

The proposed zone for this school[28] is bounded on the north by the elevated railroad, on the west by the unelevated railroad, on the south by Highway No. 61 and on the east by the tortured line discussed as the northwesterly boundary proposed for Hall (E-1-B), supra. All of these boundaries are easy to locate and identify and are suitable,[29] except the easterly line north of Seventh Street. It is not suggested that the sound capacity of this school be ignored or that its physical condition[30] not be considered, or that defendants must extend the zone for it in any particular direction, or that the temporary non-zone pupil load be ignored (see footnote 23, supra). But, considering the defects of other zones as aforementioned, this zone as now proposed cannot and will not be approved for permanent use for this school.

*Summary—South Zones*

From what has been said, it is apparent that this court is not now convinced that all or any of the proposed attendance zones south of the elevated railroad meet the criteria thus far discussed. It may well be that the lack of educational expertise on its part causes this uncertainty. Facts and figures in the record here, which are now obscure to this court, may well demonstrate with certainty that

28. For the area within this proposed zone the school plant is reasonably well located. It is within approximately one block of the geographical center of the zone. Clark has 7 classrooms but only 6 are in use. The 6 in use have a maximum rated pupil capacity of 210. All 7 rooms would have a maximum rated capacity of 245.

29. The unelevated railroad is a "suitable" boundary, but is not such an obstacle as would make its use as a boundary mandatory. (See footnote 17, *supra*.)

30. The evidence shows without dispute that this school plant is in a poor state of repair and that defendants are seriously concerned as to whether it can safely be used much longer.

these proposed zones are, or are not, constitutionally acceptable. But, at this time, in good judicial conscience, these proposals can neither be approved nor disapproved, either in whole or in part. The obvious interrelation of all these zones forbids approval of less than all. This is so to a large extent, also, because the probabilities are that this court's final action in this regard may well be action which will vitally affect the educational rights and the welfare of the children of this school district for years to come. Schools in this system are to open in approximately a month. Registration for the oncoming session will occur before that. Time, then, is extremely important. The school children of this district, plaintiffs and, assuredly, defendants need now to know what will and will not be done for the opening of schools for the school year 1965-1966. Moreover, as a practical matter, it would be impossible for defendants, upon whom the first and basic responsibility rests, to reconsider adequately, and revise if necessary, their plans for these attendance zones, in time for them to be submitted to and properly considered on an adversary basis by this court, and disposed of in time to be effective by the scheduled time for registration.

In these circumstances, in an effort to prevent anxiety and confusion on the part of all interested parties, and disruption of this school system, the attendance zones proposed for all elementary schools south of the elevated railroad will be approved for use, but only for the first semester of the oncoming school session for the school year 1965-1966, and defendants will be required to restudy and reconsider their proposals and to resubmit their plans for the attendance zoning for elementary school purposes of all of the school district south of the elevated railroad.

## IV.

### Other Issues

Plaintiffs complain of differences as between schools which have been[31] all white—pupils and staffs—and those which have been all Negro, which have existed with respect to teacher salary scales, curricula,[32] teacher-pupil ratios and per pupil expenditures of public funds. On the face of the figures furnished by defendants, most of these complaints are justified. Some of these differences have already been corrected (i. e., all teachers—Negro and white—are to be paid on exactly the same basis beginning with the 1965-1966 school session). All pupils who are entitled to attend school in this public school system have the undoubted right to benefits equal to those afforded to any other pupil of the same age or grade. Thus, all such differences as now exist will be required to be eliminated. This court's orders, inter alia, will provide:

A. That curricula at all schools of each type[33] be identical.

B. That if defendants wish to offer any course at one junior high school or at one high school and not at the other, all pupils at the other such school will be

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31. No mixing of the races in any school resulted from the desegregation under orders of this court of grades one and two during the school year 1964-1965. An appreciable number of white pupils did not attend any school in this system during that time, where the *only* school available had Negro pupils. Thus all schools and all grades continued to be segregated and plaintiffs consistently refer to "Negro" and "white" schools.

32. This complaint was with respect to differences thought to exist by one of plaintiffs' experts between courses available to the high school south of the elevated railroad and the high school north of the railroad. In response to questions from the bench, defendants' superintendent said that this was not the case and that any course available at one school was available on the same basis as at the other.

33. Type of school, of course, means elementary, junior high and high schools.

so notified and any pupil at such other school will have the right to transfer if so desired to the school where such course is to be offered.

C. Teacher-pupil ratios must be maintained at substantially the same level for each grade taught at each school of each type.

D. Per pupil expenditures of public funds must be maintained at substantially the same level for all schools of each type, except for such differences as may reasonably result from:

1) Variations in age and physical condition of school buildings and facilities.

2) Variations in types of licenses held by members of the teaching staff assigned and salaries paid.

3) Greater expenditures which may be reasonably required to bring any library, laboratory, shop, home economics equipment, visual aids equipment or supplies, or other such equipment or supplies[34] to the level of all other similar equipment or supplies at all schools of each type.

4) Greater expenditures which may be reasonably required to bring comfort and recreational facilities, equipment and supplies,[34] to the level of all other similar facilities, equipment and supplies, at all schools of each type.

Any other significant variation from standards of equal opportunity and equal treatment for all pupils of each age or grade grouping must and will be eliminated by orders of this court, where shown to exist.

Plaintiffs, with merit, also complain that the staff at each school is now on a completely segregated basis—that

34. Some of these might better be classed as capital investments rather than operating expenses, but all of them are sometimes classed generally as expenses. Hence all are included here.

is, that they are all Negro or all white in every school in the system.

Employment contracts for principals and teachers in all public schools of Mississippi extend, at the maximum, for three years. The Board of Trustees, in its discretion, may elect to enter into contracts for the maximum period, or for lesser periods of one or two years. Mississippi Code Annotated 1942 (Recompiled) §6282-17. There is no tenure except for the contractual period. The defendant school board has apparently elected to enter into contracts for the minimum period, so that principals and teachers are currently employed on one-year contracts. Contracts for the 1965-1966 school year have already been executed.

Each individual teacher is employed for a specific purpose at a specific school. The employment is accomplished upon recommendation of the principal of the particular school to the superintendent, the recommendation of the superintendent to the Board of Trustees, and the acceptance of such recommendation by the Board, followed by authorization for the execution of the contract. Mississippi Code Annotated 1942 (Recompiled) §§6282-05 to 6282-09. Thus, it is at once apparent that it would be improvident at this time to order any staff desegregation for the oncoming school year. To do so would cause unwarranted confusion, and would, as this court finds, probably result in a general lowering of the quality of education in this school system for that school year. For example, such a course of action would result in many teachers working under a principal who had not recommended that teacher's employment and at a school not considered by the teacher or the school authorities at the time when application was made to teach during the school year 1965-1966. It could result in some teachers being required to teach subjects outside the teacher's field, i.e., a history major teaching mathematics

or a science major teaching English. In effect, it would be a drastic rewriting of the contract for each teacher, and, in fact it would cause dissatisfaction and a lowering of staff morale generally. It could cause resignations by some teachers, which would, if such occurred, create the now unnecessary and serious problems of last minute efforts to find qualified replacement teachers.[35]

Hence, for these reasons, resolution of the problem of faculty desegregation will be deferred for the time being.

## V.

### Expert Witnesses

Three witnesses, each with special learning, knowledge and experience in public education, testified on the last hearing. Two of these were offered by plaintiffs. The other—the superintendent of this school system—was the principal witness for defendant. This last witness also testified extensively at the hearing held on August 19, 1964. For years he has lived and is now living with this school system. He is the principal architect of the zoning plans proposed by defendants and is an articulate, persuasive advocate for their total acceptance. He consistently planned and is now planning ahead to meet the needs of this school system which is rated and recognized as one of the outstanding public school systems in Mississippi. There can be no doubt about his devotion to the cause of public education and to the education of all children—white and Negro—who attend school at any Clarksdale public school. His lifetime of actual experience in this field demonstrates his competence. His intimate knowledge of the public school situation at Clarksdale is obvious.

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35. It is a matter of common knowledge that qualified teachers are in short supply in Mississippi. Clarksdale now has an exceptionally well qualified professional staff.

The other two experts are accepted as being educationally and theoretically well qualified. The practical experience of neither, in the actual operation of a school system (such as that of the Clarksdale Municipal Separate School District) approaches that of the superintendent. Their knowledge of this school system came from data furnished by defendants in response to interrogatories,[36] and from personal observations made during only a few hours visit to this community.

Additionally, it was obvious that each of these witnesses is committed to the philosophy that mixing of Negro and white pupils in classrooms is desirable and that such a system produces a better education for all pupils. This may well be so, but the devotion of these two witnesses to this philosophy made it difficult for them to express valid opinions with respect to the legal problems for solution by this court in this litigation. Basically, the solution of those legal problems rests on the answer to the question, "are pupils dealt with as individuals without regard to race?". The legal question is not, "are Negro and white pupils mixed in the classrooms?".

It is the legal responsibility of defendants to operate a racially non-discriminatory, desegregated school system, and the obligation of this court to see that they do. It is neither the legal responsibility of defendants, nor the obligation of this court to require that Negro and white pupils be mixed in the classroom. This is the present legal distinction between *integration* and *desegregation.* The language of the court in *Avery* v. *Wichita Falls Independent*

36. Apparently some of the terminology used by defendants (which was that used by public schools in Mississippi, by the state rating agencies, and by school rating agencies in this area) was different from that with which these witnesses were familiar, causing some confusion and misinterpretation on their part.

*School District,* 241 F. 2d 230 (5th Cir. 1957) *cert. den.* 353 U. S. 938 makes this distinction clear:

> The Constitution as construed in the School Segregation Cases . . . forbids any state action requiring segregation of children in public schools solely on account of race; it does not, however, require actual integration of the races.

The court then quoted the now classic per curiam of the three-judge court in *Briggs* v. *Elliott,* 132 F. Supp. 776 (E. D. S. C. 1955), in which it was said:

> (The Supreme Court) has not decided that the states must mix persons of different races in the schools or must require them to attend schools or must deprive them of the right of choosing the schools they attend. What it has decided, and all that it has decided, is that a state may not deny to any person on account of race the right to attend any school that it maintains. . . . Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend. The Constitution, in other words, does not require integration. It merely forbids discrimination.[37]

Judge Bell, speaking for the court in *Evers* v. *Jackson Municipal Separate School District,* 328 F. 2d 408, 410 (5th Cir. 1964), recently reaffirmed these principles, as did the Courts of Appeals for the Seventh Circuit in *Bell* v. *School City of Gary, Indiana,* 324 F. 2d 209 (7th Cir. 1963), and the Tenth Circuit in *Downs* v. *The Board of Education of Kansas City,* 336 F. 2d 988 (10th Cir.

37. This court is not unmindful of footnote 5 to Judge Wisdom's opinion in *Singleton* v. *Jackson School District,* decided June 22, 1965 by the Court of Appeals of this circuit, ..... F. 2d ..... However, the precise question of "integration" vis a vis "desegregation" was in no way an issue in that case. Hence, this court must treat the remarks in that footnote as dictum.

1964).[38] In this circuit, see also *Borders* v. *Rippy*, 247 F. 2d 268 (5th Cir. 1957); *Rippy* v. *Borders*, 250 F. 2d 690 (5th Cir. 1957); *Holland* v. *Board of Public Instruction*, 258 F. 2d 730 (5th Cir. 1958); and *Stell* v. *Savannah-Chatham County Board of Education*, 333 F. 2d 55 (5th Cir. 1964).

The same view was adopted by Congress in drafting the Civil Rights Act of 1964. Section 401 (b) of the Act, 42 U.S.C. § 2000c(b), provides:

> (b) "Desegregation" means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but "desegregation" shall not mean the assignment of students to public schools in order to overcome racial imbalance.

Nor, as it must be noted, do plaintiffs seek here a right to require affirmative integration in these schools. They clearly so state in their brief.

The aforementioned precise legal requirements, the fact that neither of plaintiffs' experts had intimate knowledge of this community or of this school system, plus the fact that neither these witnesses nor anyone else for plaintiffs offered a complete substitute zoning plan[39] for that

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38. In *Downs*, the court said:

> Appellants also contend that even though the Board may not be pursuing a policy of intentional segregation, there is still segregation in fact in the school system and under the principles of Brown v. Board of Education, supra, the Board has a positive and affirmative duty to eliminate segregation in fact as well as segregation by intention. While there seems to be authority to support that contention, the better rule is that although the Fourteenth Amendment prohibits segregation, it does not command integration of the races in the public schools and Negro children have no constitutional right to have white children attend school with them. (Citations omitted.)

39. Substantially all suggestions were with respect to individual districts or a "broad brush" generalized and sweeping statement of principles, or a similar negative statement that the proposed zones did not conform to such principles.

proposed by defendants makes it appropriate to say that these witnesses gave little help to the court. Moreover, their difficulty in distinguishing between their own apparent philosophical educational objective—integration—and the legal requirements of desegregation make it seem that some of their zoning suggestions were the product of their own beliefs rather than the result of objective analysis of all relevant facts.[40]

It is obvious that plaintiffs' experts did not know, nor understand, what weight was, or should be, given to the actual physical condition of the several school plants of this system (and the several parts of some of the plants at individual school sites). It is equally as obvious that defendants' superintendent did understand these and all other relevant factors to a remarkable degree for a man in his position and that he, in most instances, gave proper weight to all.[41] It is also obvious that these experts knew little about the development of this community, its prospective growth or the probable areas or directions thereof, while defendants did. They knew little about funds available to defendants, or sources of these funds, or requirements for budgeting or application of these funds, while defendants did. Their knowledge of actual locations of pupil population was sparse, but defendants' was sound. Their knowledge of the type of character[42] of pupils was

40 At least one zoning recommendation by one of these witnesses had no apparent justification except that it would *require* an actual mixing of Negro and white pupils. All other relevant factors seemed to be against this proposal.

41. In view of the court's present action with respect to elementary school attendance zones south of the elevated railroad, he will have time to consult more fully with the principal of each of these schools and with the maintenance and custodial personnel (many of whom were not available to him when the plan was first designed) so that, hopefully, defendants will be able to re-submit plans for those zones which this court can approve promptly.

42. Whether ambulatory or with a fixed, permanent residence, whether from disadvantaged or poor homes, or from economically sound and secure homes.

virtually nonexistent, while defendants' was sound and comprehensive. Other similar comparisons could be made, but it suffices now to say, in sum, that their approach was essentially negative disapproval of defendants' plans—in almost every category. Thus, although fully recognizing their competence in specialized fields of public education and accepting their sincerity and good purposes, this court can give little weight to their views.

On the other hand, this court is convinced that defendants' superintendent, in addition to having the qualities aforementioned, is commendably objective and without guile. It goes without saying that he is the best informed witness with respect to this school system to testify in this case. His views command respect, and it may well be that the court was at fault in not taking a more active part in examining him with respect to some, or all, of the questions for which this court does not, at this time, have clear and certain answers.

As has been said, the facts upon which such answers could be properly based may now be before the court. But, to solve the many and varied problems which obtain in devising permanent elementary school attendance zones for the area of this school district which is to the south of the elevated railroad presents to this court as formidable a legal maze as any ever dealt with by it.

Hence, the aforementioned action will be taken with respect to that part of this case in order that, in the end, this court may have as sound an understanding as possible of every aspect, every fact, every condition, every situation which may properly relate to or bear upon these problems.

## VI.

### The City of Clarksdale, Urban Renewal and Coahoma County

There are some unusual aspects to the record here and plaintiffs' position with respect thereto. Viewed pragmatically, much of this evidence, which will be discussed, is irrelevant, except as it may affect credibility of some witnesses and the good faith of defendants in preparing their plans which are at issue here.

To view it in proper perspective, it must be understood that although the territory in the Clarksdale Municipal Separate School District is identical to the territory in the City of Clarksdale, the governments of the school and of the municipality are separate and distinct. The schools are governed by a Board of Trustees. Individual trustees are elected for staggered statutory terms by the governing authorities of the municipality. Mississippi Code Annotated 1942 (Recompiled) § 6328-07 (b). Other than such elections the only connection the governing authorities of the municipality have with the school system is that they *must* levy taxes required by state law for the support of the separate school district under the minimum education program, Mississippi Code Annotated 1942 (Recompiled) § 6518-02, and additional taxes up to a statutory limit upon demand of the Board of Trustees, Mississippi Code Annotated 1942 (Recompiled) § 6518-06. Further, on petition of the Board of Trustees for tax support in addition to that provided by the last cited statute, the governing authorities of the city must call a special election so that the electors of the school district may approve or disapprove of such additional taxes. Mississippi Code Annotated 1942 (Recompiled) § 6518-07.

The governing authorities of the city have no other responsibility in law for the schools of the school district

or authority over the trustees, and the trustees of the school district have no authority with respect to any municipal problem or program.

The governing authorities of Coahoma County have no connection with, authority over or responsibility for this school district, nor for this municipality.

With that background the aforementioned evidence will be discussed. In 1961, long before this case began, the City of Clarksdale initiated a program of urban renewal, designed to improve the community primarily by the elimination of slum areas and sub-standard housing, and otherwise by the creation or construction of modern housing facilities, utility systems, and other related facilities of public usefulness. It is a matter of common knowledge that similar programs began on a nationwide basis as a result of federal programs and federal financing for them. In Clarksdale, independent, outside consultants were employed to study and survey the local situation and make recommendations to the governing authorities through the Planning Commission. These surveys, studies and plans were well under way, with the expectation that a large part of the financing to put them into effect would come from federal sources. These expectations were frustrated, however, when the Mississippi Legislature by statute destroyed the right of the city to participate in such a federal program. Mississippi Code Annotated 1942 (Recompiled) § 7300.5, effective December 21, 1962. But, the Planning Commission and governing authorities of the city chose another route to follow in financing this planned program—a city sales tax. With the proceeds of this tax, the program was undertaken, but at a much slower pace than as originally planned in the then contemplation of federal financing.

*City Actions*

1. The city acquired by purchase for park purposes a small group of houses and the land on which they were situated in what was known as Tuxedo Park. This territory was not in the school district. *Thus children living there could not attend school in the defendant school system.* These sub-standard, dilapidated houses were occupied by Negroes. They were situated on low lands adjacent to a creek which overflowed with each heavy rain. Drainage from this area, including human excreta, flowed onto the grounds of a Catholic school located across the creek and created what was recognized as an unsanitary, unhealthy situation.

2. The city, ostensibly to aid in solving its parking problems, which it, like many cities, has in abundance, purchased an area near the jail in the edge of the central business district for a public automobile parking lot. Some houses occupied by Negroes were in this area.

3. The city purchased property upon which were some houses occupied by Negroes, for garage and storage area for its street department equipment. This was in the school district.

4. Every few years Clarksdale (as do many other municipalities) makes changes (most of which are minor) to its corporate limits. The statutory procedure[43] for such
10 to 3374-16.
changes provides for

a) Adoption of an ordinance describing the territory involved, defining the entire corporate limits as they will exist after the change and stating the reasons for the change.

b) Publication of a certified copy of the ordinance in a local newspaper.

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43. Mississippi Code Annotated 1942 (Recompiled) §§ 3374-

c) Filing a petition in Chancery Court seeking approval of the proposed changes.

d) Making defendants to such court proceedings any municipality within three miles of the city limits and all parties interested in, affected by or aggrieved because of the proposed changes.

e) Having the court fix a time and place for a hearing.

f) Publishing a notice to all defendants in a local paper of the nature of the proceedings and the time and place of the hearing as fixed by the court.

g) Having a hearing before the court at the time and place fixed and obtaining court approval.

In July 1964, following all these steps as required by law, Clarksdale de-annexed some territory and annexed other. *There were no objections by plaintiffs or by anyone else.* At the end of the hearing the proposed changes (annexation and de-annexation) were approved by the Chancery Court.

In the de-annexed area there were small numbers of substandard homes occupied by Negroes. These houses were on an unimproved extension of a street alongside the railroad embankment or fill, mentioned many times herein, on very narrow, shallow lots, and were not served by two key city operated utilities—water and sewers. No area immediately adjacent is suitable for residential development in the near future, tax revenues from this property were negligible and to furnish these utility services (which would have been required if the area remained in the city) would have been prohibitively expensive to the city.

All of the areas mentioned in 1), 2), 3) and 4) are north of the elevated railroad which has been approved by this court as a key school zoning boundary.

*County Action*

The governing authorities of Coahoma County determined that it was necessary to enlarge and modernize its county jail (which this court judicially knows is also a federal contract prison) at a cost of $200,000. For this purpose and for a parking area adjacent thereto the county purchased property upon which were some houses occupied by Negroes. This area is north of the railroad on the fill.

One result of the foregoing actions, city and county, was that some Negro families[44] were required to move out of these areas. Most, if not all, of these actions were consistent with the survey, study and recommendations of the aforementioned independent consultants.

*Defendants' Attorney*

Defendants' attorney[45] was a member of the Planning Commission, which recommended all the foregoing municipal actions. His personal knowledge of each of these developments is not clear, except with respect to the Tuxedo Park acquisition. For many years before the first case in 1954 in which desegregation of public schools was required, he, for personal as well as community reasons, had worked for the correction of the unhealthy and unsanitary conditions which existed at Tuxedo Park. Obviously, these reasons had nothing to do with this case. He did and does approve all these actions. Even if he had personal, intimate knowledge of each one as it developed, and expressed his formal approval of each municipal action as a member of the Planning Commission, he was

44. It is not clear whether any children of school age were members of these families or not. The court assumes there were some. Nor is it clear where these families went.

45. He was called as a witness by plaintiffs, and testified extensively.

not then acting in any way as defendants' attorney. Other than this tenuous connection, the evidence does not show that anyone connected with the Clarksdale school system took any part in these aforementioned projects of the city and county.

Plaintiffs' position as to the foregoing actions of the municipality and county seems to the court to be that they demonstrate a conspiracy between defendants, the Planning Commission, the city and the county to prevent Negro children from going to school with white children and that, therefore, the proposed school attendance zones as proposed by defendants are all invalid. If this in fact is plaintiffs' argument, it must fail for many reasons which seem clear to the court. Some of those reasons will be discussed.

a) To accept plaintiffs' position would, in effect, require the court to find that defendants' attorney (an honorable respected member of the bar of this court for many years, known to be deeply religious), defendants' superintendent, a commissioner of the City of Clarksdale and the chairman of the Planning Commission all perjured themselves when testifying as witnesses in this court.[46] Such a finding is wholly unjustified.

b) Plaintiffs overlook the fact that the zoning plans as proposed by defendants have zones in which there are families of both the Negro and white races, with children of school ages. (The fact that no actual integration came about as a result of the desegregation during the 1964-1965 school year may be understood only when the facts are known that there is no compulsory school attendance law in Mississippi; that some white parents whose children were assigned by defendants' plans under this court's order to schools which Negro children would attend, sent those chil-

46. All but the school superintendent were called to the stand by plaintiffs.

dren to other schools, and that some grades have not yet been reached in which children of both races will attend the same school—if they go to school in this system. These grades and these schools will soon be reached under the desegregation schedule being established by this court.)

c) Even if plaintiffs' position is accepted arguendo (which it is not) the fact remains that defendants had (and now have partially) the problem of devising school attendance zones, subject to this court's approval based on the actual situation as it existed at the time these plans were devised,[47] and this without regard to why any or all of the facts and realities of the situation came about. This court cannot require that jails, parking lots and garages be razed or destroyed, nor can it require that substandard homes be built on lots where they formerly existed, to be occupied by Negro families. It cannot here undo what has been done.

This court does not yet have the power or authority to order school buildings to be built, moved or destroyed. Nor does it yet have the authority or power to require families to move from one neighborhood to another.

Plaintiffs and defendants both want and approve a school system to be operated on the neighborhood attendance zoning plan. Any fair and reasonable plan for such an operation for this school system must fit conditions as they now exist, not as they existed in the past, nor as they might ideally exist at some distant time in the future.

Thus, as has been said, the only possible value evidence of the aforementioned actions of the City of Clarksdale and Coahoma County has in this case is as it may bear on the question of good faith of defendants in their plans to deal with the grave problems presented to them by this suit. It has been so considered.

47. Of course, defendants must deal with the situation as it now exists south of the elevated railroad as to devising attendance zones for elementary schools in that area.

## VII.

### Conclusion

As has been many times said in the cases, the responsibility to accomplish desegregation in a constitutional way rests first with the school and then with the courts.[48] It is in reliance on that obvious truism that this court will call on defendants, in accordance with what has been said in this opinion, to again exercise that first responsibility with respect to plans for the attendance zoning for elementary school purposes of the southerly territory of this district. This course of action also results from the fact that this court recognizes fully that courts are ill equipped to deal with problems of this sort.[49]

Final order will be entered with respect to all elements of this controversy upon which this court has expressed its final determination in this opinion. Nisi or interim orders will be entered as to all other issues and this court, in such orders, will formally retain jurisdiction over this entire case to enter all such orders as may hereafter be required.

This the 10th day of August, 1965.

Claude F. Clayton
*District Judge*

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48. *Brown* v. *Board of Education*, 349 U.S. 294, 299 (1955); *Armstrong* v. *Board of Education*, 333 F. 2d 47, 53 (5th Cir. 1964).

49. *Calhoun* v. *Latimer*, 321 F. 2d 302 (5th Cir. 1963).

(Caption Omitted)

## ORDER OF THE DISTRICT COURT DATED AUGUST 10, 1965

### Order for Permanent Injunction

PART I.

It appearing to the satisfaction of the court that there is no just reason for delaying entry of final judgment on certain of the multiple claims for relief presented in this action, and that there is in fact pressing need for entry of final judgment as to certain of these claims, then, in accordance with the Memorandum Opinion released this date, it is

FINALLY ORDERED:

1) That the clerk of this court shall be, and he hereby is, directed to enter a final judgment, as provided in Rule 54 (b), Federal Rules of Civil Procedure, as to so much of this order as is contained in Part I. hereof.

2) That the defendants, Clarksdale Municipal Separate School District and the members of the Board of Trustees of the said school district, their agents, servants and employees, and the successors in office of said trustees, those acting in concert with them or any of them who shall receive notice of this order, shall be, and they hereby are, permanently enjoined, in assigning pupils to the grades progressively included in the schedule for racial desegregation of the public schools now or hereafter operated by or under the supervision of defendants, as provided in paragraph 3) of this order, from making any or all of such assignments solely because of the race of any or all of such pupils.

3) That assignments of pupils to the said public school on a racially non-discriminatory basis, in addition to grades one and two heretofore ordered to be desegregated, shall be made in accordance with the schedule following:

a) Grades three, four and twelve shall be racially desegregated not later than the opening of the first term or session for each of such schools for the school year 1965-1966.

b) Grades five, six, ten and eleven shall be racially desegregated not later than the opening of the first term or session for each of such schools for the school year 1966-1967.

c) Grades seven, eight and nine shall be racially desegregated not later than the opening of the first term or session for each of such schools for the school year 1967-1968.

4) That the geographic attendance areas created by order of the defendant Board of Trustees entered 21 July, 1964, and incorporated in the desegregation plans previously submitted by the defendants and temporarily approved by the court, shall be and hereby are approved to the extent hereinafter provided. Pupils who apply and are eligible for enrollment in the public schools of the district and whose grade level has been included in those grades, racially desegregated pursuant to paragraph 3), supra, shall be assigned to the public school appropriate to their grade level which is related to and located in the geographic attendance area within which such pupils reside at the time of enrollment, whether such residence obtains now or is hereafter effected, except as may be otherwise provided in this order. Such pupils whose grade levels have not been racially desegregated at the time of enrollment shall be assigned to appropriate schools in accordance with such policies as may be devised by the defendants.

5) That the following geographic attendance areas shall be, and they hereby are, finally approved:

| *Geographic Attendance Area* | *Related School* |
|---|---|
| Senior High School Sub-District One and Attendance Zone S-1-A | Clarksdale Senior High School |
| Senior High School Sub-District Two and Attendance Zone S-2-A | W. A. Higgins Senior High School |
| Junior High School Sub-District One and Attendance Zone J-1-A | Clarksdale Junior High School |
| Junior High School Sub-District Two and Attendance Zone J-2-A | W. A. Higgins Junior High School |
| Elementary Attendance Zone E-4-A | Oakhurst Elementary School |
| Elementary Attendance Zone E-4-B | Heidelberg Elementary School |
| Elementary Attendance Zone E-4-C | Kirkpatrick Elementary School |

6) That Elementary Attendance Zone E-3-A shall be, and it hereby is, finally approved as the geographical attendance area for the proposed elementary school to be constructed within this zone. From and after the com-

pletion and opening of the said school, assignment of elementary pupils who reside within this zone shall be made to the new school in the same manner as in the other Elementary Attendance Zones. Prior to the completion and opening of the proposed new school in this zone, elementary pupils who reside within Zone E-3-A may, upon application, be assigned to Oakhurst Elementary School or to Eliza Clark Elementary School in accordance with the method of assignment now in effect in this zone pursuant to orders of the defendant Board of Trustees.

7) That curricula at all elementary schools within the school district shall be identical; curricula at all junior high schools within the district shall be identical; and curricula at all senior high schools within the district shall be identical.

8) That in the event defendants wish to offer any course or courses at one junior high school in the school district and not at the other, or at one senior high school and not at the other, all pupils enrolled in the other junior or senior high school, as the case may be, will be so notified. Any pupil enrolled in the school where the course is not to be offered shall have the right to transfer if so desired to the school where such course is to be offered.

9) That defendants shall maintain teacher-pupil ratios at substantially the same level for each grade at each elementary school; at substantially the same level for each grade at each junior high school; and at substantially the same level for each grade at each senior high school.

10) That defendants shall maintain expenditures of public funds per pupil at substantially the same level at each elementary school; at substantially the same level at each junior high school; and at substantially the same level

at each senior high school; except for such differences as may reasonably result from:

a) Variations in age and physical condition of school buildings and facilities.

b) Variations in types of licenses held by members of the teaching staff assigned and salaries paid.

c) Greater expenditures which may be reasonably required to bring any library, laboratory, shop, home economics equipment, visual aids equipment or supplies, or other such equipment or supplies to the level of all such similar equipment or supplies at all schools of each type.

d) Greater expenditures which may be reasonably required to bring comfort and recreational facilities, equipment and supplies to the level of all other similar facilities, equipment and supplies at all schools of each type.

11) It appearing that defendants have taken effective action to eliminate any and all discrimination with respect to salaries for professional personnel employed in the school district, no provision need, or will be, made here in this regard.

PART II.

Further, in accordance with the Memorandum Opinion released this date, it is,

ORDERED:

12) That the following proposed Elementary Attendance Zones shall be, and they hereby are, temporarily

approved for use only during the first semester of the oncoming school session for the school year 1965-1966.

| *Elementry Attendance Zone* | *Related School* |
|---|---|
| E-1-A | George H. Oliver Elementary School |
| E-1-B | Myrtle Hall Elementary School |
| E-1-C | Eliza Clark Elementary School |
| E-2-A | Booker T. Washington Elementary School |
| E-2-B | Riverton Elementary School |

13) That defendants shall be, and they hereby are, directed to reconsider their proposals with respect to the proposed Elementary Attendance Zones listed in paragraph 12), supra, and to resubmit to this court a plan for attendance zoning for elementary school purposes of all of the school district now included in the said proposed Elementary Attendance Zones. The attendance zones to be devised by defendants in preparing the said plan shall be predicated on efficient utilization of available school facilities on a racially non-discriminatory basis in accordance with sound educational principles.

14) That the plan required by paragraph 13), supra, shall be filed by the defendants not later than 6 October, 1965, and a copy thereof shall be served on counsel for plaintiffs not later than 1 October, 1965. Plaintiffs shall have twenty days after the filing of such plan within which to file objections thereto, if any they have. A hearing will be held following the filing of the plan and objections at a time and place to be fixed by the court.

15) That Elementary Sub-Districts E-1, E-2, E-3, and E-4 shall be, and they hereby are, approved, provided, however, that defendants may, if they so desire, revise the boundaries of Sub-Districts E-1 and E-2, subject to the approval of the court, in such manner as may be neces-

sary to accommodate any changes in the Elementary Attendance Zones thereby encompassed, pursuant to the provisions of paragraphs 12) through 14), supra.

16) That all issues relating to racial desegregation of faculties and administrative personnel employed in the school district shall be, and the same hereby are, deferred for later resolution.

17) That costs, as they may have accrued to this date, shall be, and the same hereby are, awarded to plaintiffs from defendants, as they may in course be taxed.

18) That jurisdiction of this cause shall be, and the same hereby is, retained for all purposes and especially for the purpose of issuing any and all additional orders which may become necessary or appropriate for the purposes of modifying or enforcing this order, either or both.

This the 10th day of August, 1965.

Claude F. Clayton
*District Judge*

(Caption Omitted)

## ORDER OF THE DISTRICT COURT AMENDING ORDER OF OCTOBER 1, 1965

### Order Amending Order for Permanent Injunction

It appearing that the Order for Permanent Injunction entered 10 August, 1965, contained an error in paragraph 5) thereof, in that the schools related to the senior high school and junior high school sub-districts and attendance zones were inadvertently transposed, it is,

ORDERED:

That the said order shall be, and it hereby is amended pursuant to Rule 60 (a), Federal Rules of Civil Procedure to read as follows:

5) That the following geographic attendance areas shall be and they hereby are, finally approved:

| *Geographic Attendance Area* | *Related School* |
|---|---|
| Senior High School Sub-District One and Attendance Zone S-1-A | W. A. Higgins Senior High School |
| Senior High School Sub-District Two and Attendance Zone S-2-A | Clarksdale Senior High School |
| Junior High School Sub-District One and Attendance Zone J-1-A | W. A. Higgins Junior High School |
| Junior High School Sub-District Two and Attendance Zone J-2-A | Clarksdale Junior High School |
| Elementary Attendance Zone E-4-A | Oakhurst Elementary School |
| Elementary Attendance Zone E-4-B | Heidelberg Elementary School |
| Elementary Attendance Zone E-4-C | Kirkpatrick Elementary School |

This the 6th day of October, 1965.

Claude F. Clayton
*District Judge*

(Caption Omitted)

**MEMORANDUM OPINION OF THE COURT DATED DECEMBER 13, 1965**

In response to the order entered in this cause on August 10, 1965, defendants, within the time specified, filed a new revised plan for the establishment of attendance zones for the school children of elementary school age who reside south of the line of railway which is on a fill or levee and which almost bisects the school district. The territory is that included in Elementary Subdistrict E-1 and Elementary Subdistrict E-2. Plaintiffs filed objections to these proposals and a hearing was held thereon. All aspects of the case pertinent to defendants' proposed revisions and plaintiffs' objection thereto are now before the court for disposition.

Consideration has been given to all of the record made on the several hearings, as well as such interrogatories and answers thereto as seem pertinent to the issues now for determination.

Some questions were raised by the court in its Memorandum Opinion released with the aforementioned order of August 10, 1965, with respect to the boundaries proposed for Attendance Zones E-1-A (Oliver), E-2-A (Washington) and E-2-B (Riverton). Additional evidence bearing on these questions was presented and has been carefully considered. Such evidence consisted primarily of accurate locations of the places of residence of elementary school age children in each of the attendance zones and accurate and more complete information about the character of the occupancy and structures in other areas within these zones. This evidence is persuasive that defendants have devised attendance zones which are sound in the light of the need to take into proper account utilization of existing school

buildings, distances which pupils will have to travel to get to the school for their attendance zone, traffic hazards and the safety and welfare of the children. No better solutions have been proposed. Hence, these attendance zones should and will be approved.

Defendants' plan contemplates combining into one attendance zone the elementary school attendance zones originally designated as E-1-B (Hall) and E-1-C (Clark). It was with respect to a portion of the boundary between these two districts that the court raised the most serious question in its aforementioned Memorandum Opinion. The revised and present proposal would eliminate all of those questions.

Serious problems exist by reason of the proximity of the Eliza Clark Elementary School and the Myrtle Hall Elementary School. The two are quite close together. Clark is on the easterly side of Mississippi Avenue between Fifth Street and Sixth Street, with Coahoma Avenue as its easterly boundary line. Hall is to the *southeast* on the northerly side of U. S. Highway 61 between Garfield Street and Grant Street, with Seventh Street as its northerly boundary line. The southeast corner of the grounds at Clark are thus but three blocks from the northwest corner of the Hall grounds. This close proximity of these two school plants makes any boundary line which could be drawn between the two subject to serious question. These two school plants can advantageously be operated as one unit, with a consequent saving to the school district in funds required for administrative and supervisory personnel.

Defendants propose that when this revised plan becomes effective, that the first and second grades should be housed at Clark; grades three and four at Myrtle Hall No. 3 and grades five and six at Myrtle Hall No. 1, with all of

the schools in the merged district to be supervised and directed by the same personnel. The evidence indicates that if this proposal is approved, that approximately 530 pupils of elementary school age would reside in the new district where there will be 19 teachers, which would give a pupil-teacher ratio of thirty to one, a ratio favorably comparable to the system-wide pupil-teacher ratio for elementary schools.

Considering all pertinent factors, including the aforementioned proximity of these two school plants and the savings which will result from such a consolidation, the court is now persuaded that it should approve this proposal, and it will do so.

Plaintiffs have offered no real objection to the aforementioned proposed consolidation of territories into one elementary school zone. That is to say, they have raised no objections which defendants have in their power to correct or deal with. Plaintiffs do point out that many of the white children who reside in the combined or reconstituted attendance zone probably will not attend the public school system, if this plan is approved. Defendants do not have the authority or power to require that any pupil attend any public school within this system or elsewhere. And, such a position at this time is somewhat speculative, although past developments in this case indicate that plaintiffs' position may be correct. But, as has been said, defendants cannot solve this problem for plaintiffs.

The main point at issue, in the aspects of this case which are now under consideration, is that defendants propose that the revision to result from the consolidation of the aforementioned territory into one elementary school attendance zone should not become effective until the opening of school in the fall of 1966. To this proposal, plaintiffs strenuously object. They buttressed their position on

the hearing by showing that defendants, to prevent overcrowding at two elementary schools, one class, with teacher, had been moved intact from each to another elementary school building in the system where space was available. Such removals, however, are not analogous to what would occur if this court directed that this revised plan take effect at the end of the first one-half of the current school session. If the earlier date were specified, many unnecessary and hurtful problems would be presented for solution.

A large number of the pupils involved would be required to leave the school buildings and classrooms to which they have become accustomed and enter those to which they are strangers. They would also be required to adjust to new classmates. In many instances, they would be required to adjust to new teachers. To say the least, a substantial amount of time is required at the beginning of each school year for pupils to become oriented to new classmates, new teachers and in some instances, a new school building, and in most instances, a new classroom. To require that this be done twice in a given school year could be nothing other than hurtful to the pupils.

The earlier date would also be needlessly hurtful to the teachers involved, since they would be required to start working with children with whom they now are unacquainted and about whom they then would know very little. This would double the strain of what is at best a very trying period for any teacher, through which the teacher must pass at the beginning of each school session. Additionally, a substantial portion of these teachers would also be required to teach at a place or school building not specified in their contracts. This in effect would be for this court to change the provisions of these contracts between de-

fendant school district and the teachers concerned. Such a course of action would result inevitably in dissatisfaction and a loss of teacher morale and thus a loss of teacher effectiveness.

Moreover, the use of the earlier effective date, in the middle of a school year, would create many unnecessary problems for the supervisory and administrative personnel of this school system. There are now two separate school plants, each having a separate principal and separate administrative personnel, with teachers employed on the recommendation of the principal for that particular school to teach a particular grade in a particular classroom. The reassignment of the teachers which would be required in the middle of the year if the earlier date were used, would present many unnecessary problems which could not be solved to the satisfaction of all concerned. The choice between the two principals would present a difficult problem. The utilization of the services of the principal not selected would present other serious problems. Rescheduling of school events, many of which are already planned and scheduled, would pose many problems not easy of solution.

Plaintiffs' principal answer to the foregoing is that it is a long time since 1954. It is not, however, so long a time since the filing of this suit late in the school year 1963-64 (April 22, 1964). And, according to this court's view, it has moved with more than "all deliberate speed" since the many problems incident to desegregation of defendant school system became its responsibility. It is not considered a part of this court's responsibility in this case to create problems of the magnitude aforementioned by hasty action which could be hurtful to the school children of tender years who would be involved, whose welfare

is uppermost in the court's mind, as it should be in the mind of all who are connected with this litigation.

Use of the present two elementary attendance zones which would be merged into one attendance zone under defendants' proposal, E-1-B (Hall) and E-1-C (Clark), for the remainder of this school session should and will be approved.

Use of the merged or consolidated district (E-1-B) should and will be approved for use effective with the opening of school in the fall of 1966.

Additionally, defendants were given the right to propose revisions for the aforementioned Subdistricts E-1 and E-2 if they cared to do so. They made no such proposals, pointing out that the number of elementary school children resident in each of the two proposed subdistricts are approximately equal and that the north-south line of railway affords a natural boundary between these two subdistricts. Inasmuch as these subdistricts were approved in the order of August 10, 1965, no change will be made therein.

Defendants have also proposed that they should be given the authority to change attendance zone boundaries within each of these subdistricts as the need therefor may arise from the changing pattern of pupil populations and other developments of a similar nature. Such a proposal is certainly in keeping with good school administration and would, to a large extent, take defendants out of the rigid straight-jacket in which they now find themselves while the affairs of their school system are under the control of this court. However, in light of all of the facts and circumstances connected with this litigation, the court does not feel that it can approve this proposal at this time.

This could and may well require that a very thorough pupil population census be taken for each elementary school zone well in advance of the opening of a new school year in order that application can be made to this court for revision of attendance zone boundaries as may then be indicated.

A final order will be entered in accordance with the foregoing, but with a provision therein that this court will retain jurisdiction to deal with such questions as may arise in the future with respect to the operation of the schools of this school system.

This the 13th day of December, 1965.

Claude F. Clayton
*District Judge*

(Caption Omitted)

## ORDER OF THE DISTRICT COURT DATED DECEMBER 13, 1965

In accordance with the Memorandum Opinion released this date, it is,

Ordered:

1) The following geographic attendance areas and related schools created by the order of the defendant Board of Trustees on 21 July, 1964, shall be, and the same hereby are, finally approved.

| *Geographic Attendance Area* | *Related School* |
|---|---|
| Elementary Subdistrict E-1 | |
| Elementary Subdistrict E-2 | |
| Elementary Attendance Zone E-1-A | George H. Oliver Elementary School |
| Elementary Attendance Zone E-2-A | Booker T. Washington Elementary School |
| Elementary Attendance Zone E-2-B | Riverton Elementary School |

2) The Elementary Attendance Zones which were temporarily approved in paragraph 12 of the order for permanent injunction entered 10 August, 1965, for use during the first semester of the 1965-1966 school year, shall be, and the same hereby are, approved for use during the second semester of the 1965-1966 school year.

3) The proposal in the revised plan for elementary attendance zones submitted by defendants that the present Elementary Attendance Zones E-1-B and E-1-C be com-

bined to form a new Elementary Zone E-1-B, and that the related schools, Eliza Clark Elementary School and Myrtle Hall Elementary School, also be combined and operated as one unit in the manner described in the said plan, all to be effective at the beginning of the 1966-1967 school year, shall be, and the same hereby is, approved.

4) The proposal in the said revised plan that the court delegate authority to the defendant Board of Trustees to change the boundaries of attendance areas or zones within the subdistricts shall be, and the same hereby is, disapproved and denied.

5) Jurisdiction of this cause shall be, and the same hereby is, retained for all purposes and especially for the purpose of entering any and all additional orders which may become necessary or appropriate for the purposes of modifying or enforcing this order, either or both.

This the 13th day of December, 1965.

Claude F. Clayton
*District Judge*